

CHAPTER 4

FEDERAL REMEDIES

4.1 Introduction.

Courts may fashion a wide range of judicial relief in lawsuits against the military. Chief among the remedies sought in military litigation are money damages, mandamus, habeas corpus, injunctions, and declaratory judgments.

4.2 Sovereign Immunity.

a. General.

(1) General Rule. Any discussion of the remedies available from the government must begin with the doctrine of sovereign immunity, which operates as a bar to recovery of certain forms of relief from the United States. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress."¹ "The absence of consent is a fundamental, jurisdictional defect that may be asserted at any time either by the parties or by the court on its own motion."²

¹Block v. North Dakota, ex rel. Bd. of Univ. and School Lands, 461 U.S. 273, 287 (1983).

²14 C. Wright et al., Federal Practice and Procedure 186-90 (1976) (footnotes omitted) [hereinafter 14 C. Wright, A. Miller, & E. Cooper]. See Library of Congress v. Shaw, 478 U.S. 310, 314 (1986) ("the United States, in the absence of its consent, is immune from suit"). United States v. Mitchell, 463 U.S. 206, 212 (1983) ("the existence of consent is a prerequisite for jurisdiction"); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 399 (1976); United
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(2) Historical Origins. The doctrine of sovereign immunity is derived from the English concept that the king can do no wrong.³ It was not until the fifteenth century that the king attained such a protected position. During the Roman Empire, kings were believed to have received all power from the people and were therefore subject to the law.⁴ The kings and officials of the middle ages, even in places remote from Roman law, were responsible for impairments or violations of individual's private rights.⁵ Thus, prior to the fifteen century, although procedurally it was difficult to challenge kings, theoretically they were still capable of wrong.⁶

Between the fifteen and the eighteenth centuries, strengthened monarchies and increased interest in the ideas of divine right and absolute immunity encouraged the belief that the king could do or think no wrong.⁷ The theory became so pervasive that the king was unable to even authorize an unlawful act. Torts committed by his officers were deemed "ultra vires."⁸ The harsh effects of this theory were eventually tempered by the imposition of personal liability on the officers.⁹

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States v. Sherwood, 312 U.S. 584, 586 (1941); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

³14 C. Wright et al., supra note 2, at 200. See generally 1 W. Blackstone, Commentaries, at 239.

⁴See Borchard, Governmental Responsibility in Tort, Part VI, 36 Yale L. J. 1039, 1049 (1927).

⁵Id.

⁶Id. at 23, 27.

⁷Id. at 31.

⁸See 1 W. Blackstone, supra note 3, at 238-39 ("The king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never do an improper thing: in him is no folly or weakness"); Borchard, supra note 5, at 7.

⁹See Borchard, supra note 5, at 2.

During the eighteenth century, interest in the theory of natural law increased. The belief that man was endowed with inalienable rights directly conflicted with the immunity of sovereign kings.¹⁰ The conflict was most notably expressed in the French and American Revolutions.¹¹

How the English doctrine of sovereign immunity subsequently became a part of American jurisprudence is regarded as something of a mystery in the law.¹² The doctrine, as it has been developed in this country, does not rest on royal prerogatives and powers, but instead on the rationale that "official actions of the government must be protected from undue judicial interference."¹³ Despite harsh criticism,¹⁴ the Supreme Court has repeatedly reaffirmed the doctrine of sovereign immunity and Congress has never generally waived it.¹⁵

¹⁰Id.

¹¹Borchard, Governmental Responsibility in Tort, Part VII, 28 Colum. L. Rev. 577, 583 (1928).

¹²See James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 612 (1955).

¹³Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 397 (1970); see Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060 (1946).

¹⁴See, e.g., Engdahl, Immunity & Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972); Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. Rev. 597 (1982).

¹⁵Interfirst Bank Dallas v. United States, 769 F.2d 299, 303 (5th Cir. 1985), cert. denied, 475 U.S. 1081 (1986). But see Chisholm v. Georgia, 2 Dall. 419 (U.S. 1793) (Supreme Court concluded that doctrine of state immunity from suit was characteristic of autocracy and inconsistent with popular sovereignty); Borchard, supra note 5, at 38 (the 11th amendment [passed after Chisholm] restored the ancient doctrine in full effect, regardless of its historical origin in an autocratic conception of a personal sovereign).

(3) Congressional Waiver. Only Congress can waive the sovereign immunity of the United States,¹⁶ and as will be discussed below, "[O]ver the years Congress has successively broadened the consent of the United States to be sued."¹⁷ A congressional waiver of sovereign immunity cannot be implied, but must be unequivocally expressed in statute.¹⁸ Such waivers "are to be strictly construed in favor of the sovereign."¹⁹ Moreover, Congress can attach conditions to legislation waiving the sovereign immunity of United States, such as statutes of limitations. These conditions are jurisdictional in character and must be strictly observed.²⁰

(4) Federal Agencies and Officials as Defendants. That a plaintiff names a federal agency or federal official instead of the United States as a party to a lawsuit does not overcome the bar of sovereign immunity. Whether a suit is one against the United States (and within the purview of the sovereign immunity doctrine) is not determined by the identity of the parties named in the caption of the

¹⁶*Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986); *Block v. North Dakota*, 461 U.S. 273, 287 (1983). See 14 C. Wright et al., *supra* note 2, at 190-92; *Roberts v. United States*, 498 F.2d 520, 529 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

¹⁷C. Wright, *Law of Federal Courts* 128 (5th ed. 1983).

¹⁸*United States v. Mitchell*, 445 U.S. 535, 538 (1980), *citing* *United States v. King*, 395 U.S. 1, 4 (1969). See *Steel v. United States*, 813 F.2d 1545, 1552 (9th Cir. 1987); *Booth v. United States*, 990 F.2d 617 (Fed. Cir. 1993).

¹⁹*McMahon v. United States*, 342 U.S. 25, 27 (1951) (footnote omitted). See *Library of Congress*, 478 U.S. at 318; *Norton v. United States*, 581 F.2d 390, 396 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

²⁰See *Block*, 461 U.S. at 287; *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941) ("the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit"). But see *Irwin v. Dep't of Veterans Affairs*, 111 S. Ct. 453 (1990) (statutes of limitations for suits against the United States are presumptively subject to the doctrine of equitable tolling); *Phillips v. Heine*, 984 F.2d 489 (D.C. Cir. 1993).

complaint, but by the result of the judgment or decree that a court may enter.²¹ Thus, a federal agency--such as the Department of Defense--that is not statutorily authorized to be sued in its own name, shares the sovereign immunity of the government because any judgment against the agency would operate against the United States.²² Moreover, relief sought nominally against a federal official acting in his official capacity is subject to sovereign immunity if the decree operates against the latter.²³ A decree operates against the government if it will interfere with public administration, affect the public treasury, or cause the United States to do or refrain from doing some act.²⁴ Simply put, as a general rule, "an action seeking specific relief from an officer of the federal government in his official capacity is considered a suit against the sovereign."²⁵ Sovereign immunity, however, does not bar damages actions against federal officials in their individual capacities.²⁶

²¹Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687 n.6 (1949), citing Minnesota v. Hitchcock, 185 U.S. 373, 387 (1902); Carter v. Seamen, 411 F.2d 767, 770 (5th Cir.), cert. denied, 397 U.S. 941 (1969).

²²Florida v. United States Dep't of the Interior, 768 F.2d 1248, 1251 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); Midwest Growers Cooperative Corp. v. Kirkemo, 533 F.2d 455, 465 (9th Cir. 1976); Massachusetts v. Veterans Admin., 541 F.2d 119, 123 (1st Cir. 1976); Chacon v. Granata, 515 F.2d 922, 924 (5th Cir.), cert. denied, 423 U.S. 930 (1975); Helton v. United States, 532 F. Supp. 813, 818 (S.D. Ga. 1982); Hampton v. Hanrahan, 522 F. Supp. 140, 146-47 (N.D. Ill. 1981).

²³Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Larson, 337 U.S. at 687.

²⁴Dugan v. Rank, 372 U.S. 609, 620 (1963); Land v. Dollar, 330 U.S. 731 (1947); Cook v. Arentzen, 582 F.2d 870, 872 n.1 (4th Cir. 1978).

²⁵Helton, 532 F. Supp. at 819. See Malone v. Bowdoin, 369 U.S. 643, 648 (1962); Larson, 337 U.S. at 689; Hagemeyer v. Block, 806 F.2d 197, 202 (8th Cir. 1986); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Cf. Group Health Inc. v. Blue Cross Ass'n, 625 F. Supp. 69, 74-75 (S.D.N.Y. 1985), appeal dismissed, 793 F.2d 491 (2d Cir. 1986), cert. denied, 480 U.S. 930 (1987) (contractor acting as government agent may be protected by sovereign immunity).

²⁶Castenada v. United States Dep't of Agric., 807 F.2d 1478, 1479 n. 3 (9th Cir. 1987); Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir. 1985); Tate v. Carlson, 609 F. Supp. 7, 11 (S.D.N.Y.

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b. Waivers of Sovereign Immunity.

(1) Monetary Relief.

(a) General. "A money claim which can be assuaged only by expenditure from the Treasury of the United States cannot be entertained without a statutory grant of jurisdiction to a United States court, . . ." which waives the sovereign immunity of the federal government.²⁷ The two principal legislative waivers of sovereign immunity permitting monetary relief from the United States are the Tucker Act²⁸ and the Federal Tort Claims Act.²⁹ A number of other statutes permit money damages against the United States under specialized circumstances. More than a few constitutional and statutory provisions are erroneously asserted as waivers of the government's sovereign immunity from money damages.

(b) Tucker Act. The Tucker Act waives the sovereign immunity of the United States for nontort money claims founded on a contract or on the Constitution, an act of Congress, or an executive department regulation.³⁰ As discussed previously,³¹ both the district courts and the Court of Federal Claims have concurrent jurisdiction over all Tucker Act claims not exceeding

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1985); *Newhouse v. Probert*, 608 F. Supp. 978, 981 (W.D. Mich. 1985); *Pavlov v. Parsons*, 574 F. Supp. 393, 397 (S.D. Tex. 1983). See generally *infra* ch. 9.

²⁷*Rhodes v. United States*, 760 F.2d 1180, 1184 (11th Cir. 1985).

²⁸28 U.S.C. §§ 1346(a)(2), 1491.

²⁹*Id.* §§ 1346(b), 2671-80.

³⁰*United States v. Mitchell*, 463 U.S. 206, 212 (1983).

³¹See *supra* § 3.3.

\$10,000.³² The Court of Federal Claims has exclusive jurisdiction over all claims in excess of \$10,000.³³ The Tucker Act only waives sovereign immunity for nontort money claims; actions sounding in tort may not be brought under the Tucker Act.³⁴

(c) Federal Tort Claims Act. The Federal Tort Claims Act waives the sovereign immunity of the United States for certain types of tort claims.³⁵ The Federal Tort Claims Act, however, is not an all-inclusive waiver of sovereign immunity for any tort committed by a federal employee. It does not afford jurisdiction over tort claims arising in foreign countries.³⁶ Further, certain torts are expressly excluded by the Act, such as torts arising from the exercise of discretionary governmental functions,³⁷ and most intentional torts.³⁸ Additionally, the Act only waives sovereign

³²28 U.S.C. § 1346(a)(c).

³³Id.; 28 U.S.C. § 1491.

³⁴See, e.g., Tempel v. United States, 248 U.S. 121, 129 (1918); Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1868); Strick Corp. v. United States, 625 F.2d 1001 (Ct. Cl. 1980); Berdick v. United States, 612 F.2d 533, 536 (Ct. Cl. 1979); Curry v. United States, 609 F.2d 980, 982-83 (Ct. Cl. 1979); Board of Supervisors v. United States, 408 F. Supp. 556, 567 (E.D. Va. 1976), appeal dismissed, 551 F.2d 305 (4th Cir. 1977).

³⁵E.g., Andrews v. United States, 732 F.2d 366, 370 (4th Cir. 1984); Valn v. United States, 708 F.2d 116, 118 (3d Cir. 1983); Lutz v. United States, 685 F.2d 1178, 1182 (9th Cir. 1982); FSLIC v. Williams, 599 F. Supp. 1184, 1197 (D. Md. 1984).

³⁶28 U.S.C. § 2680(k). See Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994), cert. denied, 115 S. Ct. 723 (1995). United States v. Smith, 499 U.S. 160 (1991); Heller v. United States, 776 F.2d 92 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986). Cf. Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984) (Antarctica is not a "foreign country" for purposes of FTCA). But see Mulloy v. United States, 884 F. Supp. 622 (D. Mass. 1995) (finding that, although the wife of an Army captain stationed in Schweinfurt, Germany, was raped and murdered by a soldier there, the government negligence occurred in the United States where the soldier was improperly enlisted in the Army).

³⁷28 U.S.C. § 2680(a). See United States v. VARIG Airlines, 467 U.S. 797 (1984); Dalehite v. United States, 346 U.S. 15 (1953); Allen v. United States, 816 F.2d 1417 (1987), cert. denied, 484 U.S. 1004 (1988); Feyers v. United States, 749 F.2d 1222, 1225 (6th Cir. 1984), cert. denied, 471

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immunity for torts arising under state law and not for federally-based actions, such as constitutional tort claims.³⁹ Moreover, the Act does not waive the sovereign immunity of the United States to permit military personnel to pursue claims for injuries incurred incident to service.⁴⁰ Similarly, federal employees are not proper claimants when covered by the Federal Employees Compensation Act (FECA).⁴¹

(d) Other Statutes. Beyond the Tucker Act and the Federal Tort Claims Act, Congress has enacted a number of statutes that waive the United States sovereign immunity from money damages under certain circumstances. Examples of statutes that might affect the military are the

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U.S. 1125 (1985); *Nevin v. United States*, 696 F.2d 1229, 1230 (9th Cir.), cert. denied, 464 U.S. 815 (1983).

³⁸28 U.S.C. § 2680(h). See *Hoot v. United States*, 790 F.2d 836 (10th Cir. 1986); *Garcia v. United States*, 776 F.2d 116, 117 (5th Cir. 1985); *Wine v. United States*, 705 F.2d 366, 367 (10th Cir. 1983); *Turner v. United States*, 595 F. Supp. 708, 709-10 (W.D. La. 1984). But see *Mulloy*, 884 F. Supp. at 622 (denying motion to dismiss based on the intentional torts exceptions).

³⁹See *Birnbaum v. United States*, 588 F.2d 319, 327-28 (2d Cir. 1978); *Brown v. United States*, 653 F.2d 196, 201 (5th Cir. 1981), *Nichols v. Block*, 656 F. Supp. 1436, 1444 (D. Mont. 1987); *Willis v. United States*, 600 F. Supp. 1407, 1414 (N.D. Ill. 1985).

⁴⁰*United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Shearer*, 473 U.S. 52 (1985); *Feres v. United States*, 340 U.S. 135 (1950); *Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986); *Stubbs v. United States*, 744 F.2d 58, 60 (8th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Maw v. United States*, 733 F.2d 174, 175 (1st Cir. 1984); *Heilman v. United States*, 731 F.2d 1104, 1106 (3d Cir. 1984); *Johnson v. United States*, 704 F.2d 1431, 1435 n.2 (9th Cir. 1983); *Lombard v. United States*, 690 F.2d 215, 218 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Kohn v. United States*, 680 F.2d 922, 926 (2d Cir. 1982); *Stanley v. CIA*, 639 F.2d 1146 (5th Cir. 1981).

⁴¹5 U.S.C. § 8116(c). See, e.g., *Tazelaar v. United States*, 558 F. Supp. 1369, 1371-72 (N.D. Ill. 1983).

Privacy Act,⁴² the Unjust Conviction Act,⁴³ Title VII of the Civil Rights Act of 1964,⁴⁴ and provisions of the Civil Rights Act of 1991.⁴⁵

(e) Commonly Asserted Provisions Not Waiving Sovereign Immunity.

Plaintiff's counsel commonly assert a number of statutory and constitutional provisions as waivers of sovereign immunity for money damages that do not waive the immunity of the United States. Some of these provisions are: (1) the federal question jurisdiction statute (28 U.S.C. § 1331);⁴⁶ (2) the commerce and trade regulation jurisdiction statute (28 U.S.C. § 1337);⁴⁷ (3) the civil rights jurisdiction statute (28 U.S.C. § 1343);⁴⁸ (4) the mandamus statute (28 U.S.C. § 1361);⁴⁹ (5) the Declaratory

⁴²5 U.S.C. § 552a(g).

⁴³28 U.S.C. §§ 1495, 2513.

⁴⁴42 U.S.C. § 2000e-16. *Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990), cert. denied, 111 S. Ct. 1102 (1991). The provisions of the Civil Rights Act of 1964 do not extend to uniformed members of the armed forces. *Roper v. Dep't of Army*, 832 F.2d 247 (2d Cir. 1987); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), cert. denied; 488 U.S. 959 (1988); *Gonzalez v. Dep't of Army*, 718 F.2d 926 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978); *Cobb v. United States Merchant Marine Academy*, 592 F. Supp. 640, 642 (E.D.N.Y. 1984). But see *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986). Claims under Title VII lie in the district court, not the Court of Claims. *Bunch v. United States*, 33 Fed. Cl. 337 (1995) (case dismissed where Reserve colonel sought promotion to brigadier general and retroactive back pay, in part under Title VII).

⁴⁵42 U.S.C. § 1981.

⁴⁶*Hagemeier v. Block*, 806 F.2d 197, 202-03 (9th Cir. 1986); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985); *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir.), cert. denied, 459 U.S. 832 (1982); *Estate of Watson v. Blumenthal*, 586 F.2d 925, 930 (2d Cir. 1978); *Twin Cities Chippewa Tribal Counsel v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967).

⁴⁷Hagemeier, 806 F.2d at 203.

⁴⁸*Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972); *Gray Moving & Storage, Inc. v. Fichback*, 516 F. Supp. 1165, 1166 (D. Colo. 1981); *Foreman v. General Motors Corp.*, 473 F. Supp. 166, 182 (E.D. Mich. 1979).

Judgment Act (28 U.S.C. §§ 2201-02);⁵⁰ (6) the Administrative Procedure Act (5 U.S.C. §§ 701-06),⁵¹ (7) the Civil Rights Acts of 1866 and 1871 (42 U.S.C. §§ 1981, 1983, & 1985);⁵² and (8) the various articles and amendments of the United States Constitution.⁵³ As discussed in Chapter 9, the

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⁴⁹*Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980); *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971); but see *Helton v. United States*, 532 F. Supp. 813, 821 (S.D. Ga. 1982).

⁵⁰*Mitchell v. Riddell*, 402 F.2d 842, 846 (9th Cir. 1968), cert. denied, 394 U.S. 456 (1969); *Karlin v. Clayton*, 506 F. Supp. 642, 644 (D. Kan. 1981).

⁵¹*Massachusetts v. Departmental Grant Appeals Bd.*, 815 F.2d 778, 782-83 (1st Cir. 1987); *Smith v. Booth*, 823 F.2d 94, 97 (5th Cir. 1987); *Rhodes v. United States*, 760 F.2d 1180, 1184 (11th Cir. 1985). But cf. *Maryland Dep't of Human Resources v. United States Dep't of Health & Human Serv.*, 763 F.2d 1441, 1446-48 (D.C. Cir. 1985) (APA authorizes suit for specific monetary relief, but not damages).

⁵²*Unimex, Inc. v. United States Dept. of Hsg. & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979) (§ 1985); *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (§ 1981); *Petterway v. Veterans Admin. Hosp.*, 495 F.2d 1223, 1225 (5th Cir. 1974) (§ 1981); *Navy, Marshall & Gordon, P.C. v. United States Internat'l Dev.-Cooperation Agency*, 557 F. Supp. 484, 488 (D.D.C. 1983) (§ 1981); *Ricca v. United States*, 488 F. Supp. 1317, 1325 (E.D.N.Y. 1980) (§§ 1983 & 1985); *Benima v. Smithsonian Inst.*, 471 F. Supp. 62, 68 (D. Mass. 1979) (§ 1981); *Morpurgo v. Board of Higher Educ.*, 423 F. Supp. 704, 714 (S.D.N.Y. 1976) (§§ 1981, 1983, & 1985).

⁵³*United States v. Testan*, 424 U.S. 392, 400-01 (1976); *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1982), cert. denied, 459 U.S. 832 (1983); *Jaffee v. United States*, 592 F.2d 712, 717-18 (3d Cir.), cert. denied, 441 U.S. 961 (1979); *Kentucky ex rel. Hancock v. Ruckelshaus*, 362 F. Supp. 360, 368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), aff'd sub nom. Hancock v. Train, 426 U.S. 167 (1976); *Phillips v. Perry*, 883 F. Supp. 539 (W.D. Wash. 1995) (granting summary judgment to defendants as to claims that separation for engaging in homosexual acts violates the plaintiff's rights to equal protection, due process, and free speech).

United States cannot be sued directly for constitutional torts, generically known as Bivens claims.⁵⁴ The government's sovereign immunity from suit bars such claims.⁵⁵

(2) Nonmonetary Relief.

(a) General. Until 1976, the doctrine of sovereign immunity was a major limitation on the power of the federal courts to entertain nonmonetary claims against the United States. The success of such claims depended on the application of various judicially-created fictions circumventing sovereign immunity. In 1976, Congress virtually eliminated this limitation through an amendment to the Administrative Procedure Act (APA). When applicable, the APA waives the sovereign immunity of the United States in all actions other than those for money damages.⁵⁶ Finally, a number of statutes, such as the Freedom of Information Act and the Privacy Act, waive the government's sovereign immunity from nonmonetary relief in special types of cases.

⁵⁴Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980). See infra ch. 9.

⁵⁵Bivens, 403 U.S. at 410 (Harlan, J., concurring); Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982); Brown v. United States, 653 F.2d 196, 199 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982); Association of Commodity Traders v. United States Dep't of the Treasury, 598 F.2d 1233, 1235 (1st Cir. 1979); Norton v. United States, 581 F.2d 390, 393 (4th Cir.), cert. denied, 439 U.S. 1003 (1978); Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976). See also Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972); Note, Rethinking Sovereign Immunity after Bivens, 57 N.Y.U. L. Rev. 596 (1982) (advocating abrogation of sovereign immunity for Bivens suits).

⁵⁶A court may appropriately decide whether the military followed procedures because by their nature the procedures limit the military's discretion. The court is not called on to exercise any discretion reserved to the military. Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 1402 (1994); Smith v. CHAMPUS, 884 F. Supp. 303 (S.D. Ind. 1994), rev'd on other grounds, 97 F.3d 950 (7th Cir. 1996) (granting summary judgment to a plaintiff who sought an order that CHAMPUS could not deny her treatment for breast cancer).

(b) Judicially-created exceptions. In the absence of express statutory waivers of sovereign immunity, the Supreme Court has fashioned two nonstatutory exceptions to the doctrine. Plaintiffs may sue federal officials for injunctive-type relief (1) where the officials have acted beyond their statutory powers (i.e., where the officials commit ultra vires acts); or (2) where the officials act within the scope of their statutory powers, but the powers themselves, or the manner in which they are exercised, are constitutionally void.⁵⁷ The rationale behind these exceptions is that federal officials who act in excess of their statutory or constitutional authority cannot be acting on behalf of the sovereign.

Of course, the action of an officer beyond his delegated [statutory] authority is not within the realm of the sovereign's business and thus the officer is subject to federal court jurisdiction as any other individual. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. at 689-90, 69 S. Ct. at 1461-62. Similarly, if the officer's action, or the statutory authority for his action, is unconstitutional, such action is invalid ab initio and is not within the power of the sovereign to sanction or delegate. Id. at 690, 69 S. Ct. at 1461. In both instances, i.e., action ultra vires or unconstitutional, a suit for specific relief may be maintained against the public official as an individual. See 14 C. Wright, A. Miller & E. Cooper [Federal Practice & Procedure] § 3655, at 184-187 ((1976)).⁵⁸

⁵⁷Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 689-90 (1949). See Dugan v. Rank, 372 U.S. 609, 621-22 (1963); Malone v. Bowdoin, 369 U.S. 643, 647 (1962). An official does not act beyond the scope of authority by committing a mistake of fact or law. "Ultra vires claims rest on the official's lack of delegated power." United States v. Yakima Tribal Court, 806 F.2d 853, 859-60 (9th Cir. 1986).

⁵⁸Helton v. United States, 532 F. Supp. 813, 819-20 (S.D. Ga. 1982). See also Engdahl, supra note 14, at 48.

These two judicially-created exceptions to sovereign immunity only allow suits for specific injunctive-type relief against federal officials.⁵⁹ The exceptions do not permit the award of affirmative relief--such as money damages--against the government.⁶⁰

(c) The Administrative Procedure Act (APA).

(i) General. By an amendment to the APA in 1976, Congress virtually eliminated the bar of sovereign immunity in lawsuits for nonmonetary relief against the government.⁶¹ The Act provides in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority

⁵⁹Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949); Bunch v. United States, 33 Fed. Cl. 337 (1995).

⁶⁰Clark v. Library of Congress, 750 F.2d 89, 104 (D.C. Cir. 1984); New Mexico v. Regan, 745 F.2d 1318, 1320 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Glines v. Wade, 586 F.2d 675, 681-82 (9th Cir. 1978), rev'd on other grounds sub nom. Brown v. Glines, 444 U.S. 348 (1980); Ogletree v. McNamara, 449 F.2d 93, 99-100 (6th Cir. 1971).

⁶¹Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976) (codified as 5 U.S.C. § 702).

to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.⁶²

Although at one time there was some doubt,⁶³ it is now well-settled that section 702 waives sovereign immunity in cases where plaintiffs seek equitable, nonmonetary relief from the government.⁶⁴ The APA does not waive sovereign immunity as to claims for monetary damages.⁶⁵ However, monetary relief, other than damages, may be awarded incident to specific equitable relief.⁶⁶ Moreover, section 702 "does not affect other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate or equitable ground" such as justiciability, exhaustion of administrative remedies, reviewability, and the like.⁶⁷

⁶²5 U.S.C. § 702.

⁶³See *Estate of Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978).

⁶⁴See, e.g., *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984); *Ghandi v. Police Dept.*, 747 F.2d 338, 343 (6th Cir. 1984); *Minnesota v. Heckler*, 718 F.2d 852, 858 (8th Cir. 1984); *B. K. Instruments, Inc. v. United States*, 715 F.2d 713, 724-25 (2d Cir. 1983) (holding *Estate of Watson v. Blumenthal* was incorrectly decided); *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 922 (4th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Beller v. Middendorf*, 632 F.2d 788, 796-97 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Sheehan v. Army & Air Force Exchange Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979).

⁶⁵5 U.S.C. § 702. See, e.g., *Rhodes v. United States*, 760 F.2d 1180, 1184 (11th Cir. 1985); *Ghandi*, 747 F.2d at 343; *Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1981); *Jaffee*, 592 F.2d at 718-19; *Medina v. O'Neill*, 589 F. Supp. 1028, 1035 (S.D. Tex. 1984); *Maryland Dep't of Human Resources v. United States Dep't of Health & Human Services*, 763 F.2d 1441, 1446-48 (D.C. Cir. 1985) (APA authorizes suits for specific relief that are monetary in character, but not relief in the form of damages); compare *Massachusetts v. Departmental Grant Appeals Bd.*, 815 F.2d 778, 782-83 (1st Cir. 1987) (disagreeing with *Maryland Dep't of Human Resources*).

⁶⁶See *Bowen v. Massachusetts*, 487 U.S. 905 (1988); see also *supra* §3-3c.(3).

⁶⁷14 C. Wright et al., *supra* note 2, at 2430; H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9-10, 12, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6129-30, 6132-33.

(ii) Applicability of the APA to the Armed Forces. The APA is generally applicable to the military departments.⁶⁸ The APA does not apply, however, to courts-martial and military commissions or to military authority exercised in the field in time of war or in occupied territories.⁶⁹ Moreover, certain agency decisions are exempt from review under the APA. Examples include decisions committed to agency discretion by law and those arising under a statute that precludes judicial review.⁷⁰

(d) Other Statutes. In addition to the APA, Congress has waived sovereign immunity as to nonmonetary relief under specialized circumstances. Examples include the Freedom of Information Act⁷¹ and the Privacy Act.⁷²

4.3 Types of Remedies.

a. Introduction. The primary remedies sought in civil actions against the military in federal district courts are money damages, mandamus, habeas corpus, injunctions, and declaratory judgments. Modern procedure allows the district court judge considerable flexibility in the remedies that may be applied in a given case regardless of what the plaintiff requests. For example, in an action seeking

⁶⁸See *Dronenburg v. Zech*, 741 F.2d 1388, 1390 (D.C. Cir.), reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984) (en banc); *Beller v. Middendorf*, 632 F.2d 788, 796-98 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981); *Sheehan v. Army & Air Force Exchange Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982); *Jaffee v. United States*, 592 F.2d 712, 719-20 (3d Cir.), cert. denied, 441 U.S. 961 (1979); *Ornato v. Hoffman*, 546 F.2d 10 (2d Cir. 1976).

⁶⁹5 U.S.C. § 701(b)(1).

⁷⁰*Id.* § 701(a). See infra § 6.2.

⁷¹*Id.* § 552. See, e.g., *Chrysler v. Brown*, 441 U.S. 281 (1979).

⁷²5 U.S.C. § 552a.

mandamus to compel a federal official to do his duty, the judge may well issue an injunction if that remedy best serves justice.

b. Monetary Relief. The two principal statutes providing monetary relief against the United States are the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, and the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491.

(1) Federal Tort Claims Act. A detailed analysis of the FTCA is beyond the scope of this text; other works cover the topic thoroughly.⁷³ It bears noting again, however, that members of the military may not bring actions under the FTCA for injuries sustained incident to their military service.⁷⁴

(2) Tucker Act.

(a) Scope of the Tucker Act--Absence of Substantive Rights. Under the Tucker Act, the United States Court of Federal Claims has jurisdiction over suits for money damages based on the Constitution, a statute, or an express or implied contract with the United States. The district courts have concurrent jurisdiction with the Court of Federal Claims to the extent a claim does not exceed \$10,000.⁷⁵ The Tucker Act is a jurisdictional basis for suits in the federal courts,⁷⁶ and a waiver of the government's sovereign immunity from certain nontort money claims.⁷⁷ Jurisdiction under

⁷³See, e.g., L. Jayson, *Handling Federal Tort Claims* (1988).

⁷⁴*United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Shearer*, 473 U.S. 52 (1985); *Feres v. United States*, 340 U.S. 135 (1950).

⁷⁵28 U.S.C. §§ 1346(a)(2), 1491. See *supra* § 3.2.

⁷⁶*United States v. Testan*, 424 U.S. 392, 398 (1976).

⁷⁷*United States v. Mitchell*, 463 U.S. 206, 212 (1983).

the Tucker Act is limited to claims that are principally for money damages; the Act will not support other forms of relief, such as mandamus or declaratory judgment.⁷⁸ Moreover, the Tucker Act does not create any substantive rights enforceable against the United States for money damages; rather, a plaintiff must base its claim on a contract, or on the Constitution, statute, or regulatory provision that grants the plaintiff a right to monetary relief. In United States v. Testan, the Supreme Court explored the need for a substantive basis for money damages against the United States under the Tucker Act.

UNITED STATES v. TESTAN
424 U.S. 392 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This is a suit for reclassification of federal civil service positions and for backpay. It presents a substantial issue concerning the jurisdiction of the Court of Claims and the relief available in that tribunal.

I

The plaintiff-respondents, Herman R. Testan and Francis L. Zarrilli, are trial attorneys employed in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, in Philadelphia. They represent the Government in certain matters that come before the Armed Services Board of Contract Appeals of the Department of Defense. Their positions are subject to the Classification Act, 5 U.S.C. § 5101 et seq., and they are presently classified at civil service grade GS-13.

In December 1969 respondents, through their Chief Attorney, requested their employing agency to reclassify their positions to grade GS-14. The asserted ground was that their duties and responsibilities met the requirements for the higher grade under standards promulgated by the Civil Service Commission in General Attorney Series

⁷⁸United States v. King, 395 U.S. 1 (1969); Austin v. United States, 206 Ct. Cl. 719, 723, cert. denied, 423 U.S. 911 (1975); Willis v. United States, 600 F. Supp. 1407, 1412 (N.D. Ill. 1985); Travelers Idem. Co. v. United States, 593 F. Supp. 625, 626 (N.D. Ga. 1984); Georgia Gazette Publ. Co. v. United States Dep't of Defense, 562 F. Supp. 1000, 1002-03 (S.D. Ga. 1983). The Claims Court may, however, award limited equitable relief that is incidental to a money judgment. 28 U.S.C. § 1491(b).

GS-905-0. In addition, they contended that their duties were identical to those of other trial attorneys in positions classified as GS-14 in the Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio, and that under the principle of "equal pay for substantially equal work," prescribed in §5101(1)(A), they were entitled to the higher classification.

The agency, after an audit by a position classification specialist, concluded that the respondents' assigned duties were properly classified at the GS-13 level under the Commission's classification standards. On appeal, the Commission reached the same conclusion and denied reclassification. The Commission also ruled that comparison of the positions held by the respondents with those of attorneys employed by the referenced logistics Command was not a proper method of classification.

The two respondents then instituted this suit in the Court of Claims. Each sought an order directing reclassification of his position as of the date (May 8, 1970) of the first administrative denial of his request, and backpay, computed at the difference between his salary and grade GS-14 (and the claimed appropriate within-grade step), from that date. . . .

The Court of Claims considered the case en banc and divided 4-3. . . . The majority felt . . . that if the Commission were to determine that it had made an erroneous classification, that determination "could create a legal right which we could then enforce by a money judgment." . . .

The majority [held] that the Commission's failure to compare respondents' positions with those of the Logistics Command attorneys was arbitrary and capricious. . . . The court ruled that it had the power under the remand statute, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed. Supp. IV), to order the Commission to reconsider its classification decision "under proper directions." Accordingly, and pursuant to its Rule 149(b), the court remanded the case to the Commission to make the comparison and to report the result to the court.

. . . .

We granted certiorari because of the importance of the issue in the measure of the Court of Claims' statutory jurisdiction, and because of the significance of the court's decision upon the Commission's administration of the civil service classification system. 420 U.S. 923 (1975).

We turn to the respective statutes that are advanced as support for the action taken by the Court of Claims.

A. The Tucker Act. The central provision establishing the jurisdiction of the court is that part of the Tucker Act now codified as 28 U.S.C. § 1491:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

This Court recently had occasion to examine the jurisdiction of the Court of Claims under this statutory formulation. In United States v. King, 395 U.S. 1 (1969), the Court reviewed a decision (182 Ct. Cl. 631, 390 F.2d 894) in which the Court of Claims had concluded that it was empowered to exercise jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court observed that the Court of Claims was established by Congress in 1855; that "[t]hroughout its entire history," until the King case was filed, "its jurisdiction has been limited to money claims against the United States Government"; that decided cases in this Court had "reaffirmed this view of the limited jurisdiction of the Court of Claims," and "the passage of the Tucker Act in 1887 had not expanded that jurisdiction to equitable matters"; that "neither the Act creating the Court of Claims nor any amendment to it granted that court jurisdiction of the case before it because King's claim was "not limited to actual, presently due money damages from the United States"; and that what King was requesting was "essentially equitable relief of a kind that the Court of Claims has held throughout its history. . . it does not have the power to grant." 395 U.S., at 2-3. The Court then went on to hold that the Declaratory Judgment Act did not grant the Court of Claims authority to issue declaratory judgments. Cited in support of all this were Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962) (Harlan, J.) (plurality opinion); United States v. Jones, 131 U.S. 1 (1889); and United States v. Alire, 6 Wall. 573, 575 (1868). See Lee v. Thornton, 420 U.S. 139 (1975); Richardson v. Morris, 409 U.S. 464 (1973); United States v. Sherwood, 312 U.S. 584, 589-591 (1941).

The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists. Eastport S. S. Corp. v. United States, 178 Ct. Cl. 599, 605-607, 372 F.2d 1002, 1007-1009 (1967). We therefore must determine whether the two other federal statutes that are invoked by the respondents confer a

substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications.

B. The Classification Act. Inasmuch as the trial judge proposed, App. 57, that the respondents were not entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596, and the Court of Claims held that there was no need for it to reach and construe that Act, 205 Ct. Cl., at 333, 499 F.2d, at 691, it is implicit in the court's decision in favor of respondents that a violation of the Classification Act gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications.

It long has been established, of course, that the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S., at 586. And it has been said, in a Court of Claims context, that a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S., at 4; Soriano v. United States, 352 U.S. 270, 276 (1957). Thus, except as Congress has consented to a cause of action against the United States, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." United States v. Sherwood, 312 U.S., at 587-588.

We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified.

In answer to this fact, the respondents and the amici make two observations. They first argue that the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages. It is said that the Government has confused two very different issues, namely, whether there has been a waiver of sovereignty, and whether a substantive right has been created, and it is claimed that where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation.

The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do not rest their claims upon a contract; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp. v. United States, 178 Ct. Cl., at 607, 372 F.2d at 1009; Mosca v. United States, 189 Ct. Cl. 283, 290, 417 F.2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 (1970). We are not ready to tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy. See Brief for Amici Curiae 9-11. In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of amici that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.

We perceive nothing in the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), cited by the amici with other cases centering in the Just Compensation Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"), that lends support to the respondents. These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision, Jacobs v. United States 290 U.S. 13, 16 (1933), and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States.

The respondents and the amici next argue that the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages because if this were not so, the employee would then have a right without a remedy, inasmuch as he is denied access to the one forum where he may seek redress.

Here again we are not persuaded. Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim--whether it be the Constitution, a statute, or a regulation--does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp. v. United States, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009. We see nothing akin to this in the Classification Act or in the context of a suit seeking reclassification.

The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. United States v. Wickersham, 201 U.S. 390 (1906). There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967). The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.

....

The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See Edelman v. Jordan, 415 U.S. 651 (1974). Respondents, of course, have an administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act, 5 U.S.C. §§ 5101-5115. The amici so recognize. Brief for Amici Curiae 13-15. Among the Act's provisions along this line are those requiring the Civil Service Commission to engage in supervisory review of an agency's classifications, and, where necessary, to review and reclassify individual positions, 5 U.S.C. § 5110; allowing the Commission to reclassify, § 5112; and allowing the Commission even to revoke or suspend the agency's authority to classify its own positions, § 5111. Indeed, as the amici describe it: "[T]he Act is not merely a hortatory catalogue of high principles." Brief for Amici Curiae 15. The built-in avenue of administrative relief is one response to these statutory requirements. Review and reclassification may be brought into play at the request of an employee. 5 U.S.C. § 5112(b). And respondents, as has been noted, did just that. A second possible avenue of relief--and it, too, seemingly, is only prospective--is by way of mandamus, under 28 U.S.C. § 1361, in a proper federal district court. In this way, also, the respondents have asserted their claims. See n.5, supra.

The respondents, thus, are not entirely without remedy. They are without the remedies in the Court of Claims of retroactive classification and money damages to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct.

Finally, we note that if the respondents were correct in their claims to retroactive classification and money damages, many of the federal statutes--such as the Back Pay Act--that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

The Court of Claims, in the present case, sought to avoid all this by its remand to the Civil Service Commission for further proceedings. If, then, the Commission were to find that the respondents were entitled to a higher grade, the Court of Claims announced that it would be prepared on appropriate motion to enter an award of money damages for the respondents for whatever backpay they lost during the period of their wrongful classifications. See Chambers v. United States, 196 Ct. Cl. 186, 451 F.2d 1045 (1971). The remand statute, Pub. L. 92-415, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed., Supp. IV), authorizes the Court of Claims to "issue orders directing restoration to . . . position, placement in appropriate duty . . . status, and correction of applicable records" in order to complement the relief afforded by a money judgment, and also to "remand appropriate matters to any administrative . . . body" in a case "within its jurisdiction." The remand statute, thus, applies only to cases already within the court's jurisdiction. The present litigation is not such a case.

....

C. The Back Pay Act. This statute, which the Court of Claims found unnecessary to evaluate in arriving at its decision, does not apply, in our view, to wrongful classification claims. The Act does authorize retroactive recovery of wages whenever a federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U.S.C. § 5596(b). The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess., 3 (1966). The Commission consistently has so construed the Back Pay Act. See 5 C.F.R. § 550.803(e) (1975). So has the Court of Claims. See Desmond v. United States, 201 Ct. Cl. 507, 527 (1973).

For many years federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. Compare Keim v. United States, 177 U.S. 290, 293-296 (1900), with United States v. Wickersham, 201 U.S. 390 (1906). See

Sampson v. Murray, 415 U.S. 61, 69-70 (1974). Relief was invariably denied where the claim was that the employee had been denied a promotion on improper grounds. See Keim v. United States, 177 U.S., at 296; United States v. McLean, 95 U.S., at 753.

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. § 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay.

But federal agencies continue to have discretion in determining most matters relating to the terms and conditions of federal employment. One continuing aspect of this is the rule, mentioned above, that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.

....

III

We therefore conclude that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications. This makes it unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency.

The Court of Claims was in error when it remanded the case to the Civil Service Commission for further proceedings. That court's judgment is therefore reversed, and the case is remanded with directions to dismiss the respondent's suit.

It is so ordered.⁷⁹

⁷⁹See Army & Air Force Exchange Serv. v. Sheehan, 456 U.S. 728 (1982); Guercio v. Brody, 884 F.2d 1372, 1734 (Fed. Cir. 1989); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441, 1449-50 (D.C. Cir. 1985); Eastport S. S. Corp. v. United States, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967); Beaumont v. Orr, 601 F. Supp. 121 (D.D.C. 1985); Willis v. United States, 600 F. Supp. 1407 (N.D. Ill. 1985); Yocum v. United States, 589 F. Supp. 706, 709 (E.D. Pa. 1984); Lunetto v. United States, 560 F. Supp. 712 (N.D. Ill. 1983).

(b) Back Pay Claims. One of the most common suits under the Tucker Act is the suit for back pay. As noted in Testan, however, to recover back pay under the Tucker Act claimants must establish a contract or a constitutional, statutory, or regulatory provision that entitles them to money damages from the United States. The following are some of the more commonly-asserted bases for back pay claims.

(i) Civilian Employee Pay Claims. The Back Pay Act⁸⁰ authorizes the recovery of wages whenever a federal civilian employee has been found by an "appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee. . . ." When applicable, the Back Pay Act provides a substantive basis for the recovery of back wages and allowances by federal civilian employees under the Tucker Act jurisdiction.⁸¹

(ii) Military Pay Claims. Servicemembers and former servicemembers are not subject to the Back Pay Act.⁸² Claims of members and former members of the military for lost pay and allowances are based on their statutory entitlement to pay.⁸³ The claims are predicated on the theory that until a servicemember's active duty status or entitlement to pay has been legally terminated, by expiration of the term of enlistment or as otherwise prescribed by law, he or she has a statutory right

⁸⁰5 U.S.C. § 5596(b).

⁸¹United States v. Testan, 424 U.S. 392, 405-06 (1976).

⁸²Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979).

⁸³37 U.S.C. § 204.

to receive the monetary benefits of his or her service.⁸⁴ Additionally, the courts generally treat the back pay claims of officers and enlisted persons differently. Officers who serve indefinitely are deemed to serve in an active duty status until legally separated. Thus, officers who are unlawfully discharged are entitled to recover back pay from the date of their illegal separation to the date they are lawfully discharged--usually after final judgment is rendered in their case.⁸⁵ Enlisted personnel, on the other hand, serve under contract for a term of years. If unlawfully separated, they are entitled to back pay only until the date their enlistment would have otherwise terminated.⁸⁶ The difference in the resolution of enlisted and officer back pay claims is best illustrated in O'Callahan v. United States,⁸⁷ which involved the back pay claim of the habeas corpus petitioner of O'Callahan v. Parker,⁸⁸ fame.

O'CALLAHAN v. UNITED STATES
451 F.2d 1390 (Ct. Cl. 1971)

Before COWEN, Chief Judge, and LARAMORE, DURFEE, DAVIS, COLLINS,
SKELTON and NICHOLS, Judges.

⁸⁴Sanders, 594 F.2d at 804. See Harmel, Military Pay Cases Before the Court of Claims, 55 Geo. L.J. 529, 532 (1966). Cf. Sawyer v. United States, 930 F.2d 1577 (Fed. Cir. 1991) (claims court has jurisdiction over former servicemember's challenge to decision denying him disability retirement because servicemember is entitled to disability pay under 10 U.S.C. § 1201 unless it is lawfully withheld).

⁸⁵See, e.g., Werner v. United States, 642 F.2d 404 (Ct. Cl. 1981); Hamlin v. United States, 391 F.2d 941 (Ct. Cl. 1968); Egan v. United States, 158 F. Supp. 377 (Ct. Cl. 1958); Boruski v. United States, 155 F. Supp. 320 (Ct. Cl. 1957).

⁸⁶See, e.g., Dodson v. United States, 988 F.2d 1199 (Fed. Cir. 1993); Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985); Austin v. United States, 206 Ct. Cl. 719, cert. denied, 423 U.S. 911 (1975); Kirk v. United States, 164 Ct. Cl. 738 (1964).

⁸⁷451 F.2d 1390 (Ct. Cl. 1971).

⁸⁸395 U.S. 258 (1969). See Groves v. United States, 47 F.3d 1140 (Fed. Cir 1995) (Army Reserve officer's back pay claims should have been decided based on when he was sentenced, not when he was released from confinement).

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

NICHOLS, Judge.

In this action under 28 U.S.C. § 1491, plaintiff seeks payment of military pay and allowances for the entire period from the date of his illegal discharge to the date of decision in this court. On October 11, 1956, while serving an enlistment due to expire on March 8, 1961, plaintiff was convicted by general court-martial of attempted rape, housebreaking, and assault with intent to rape, and sentenced to ten years confinement, dishonorable discharge, and forfeiture of all pay and allowances. On June 2, 1969, the Supreme Court, on writ of habeas corpus, reversed the conviction in O'Callahan v. Parker, 395 U.S. 258, 89 S. Ct. 1683, 23 L.Ed.2d 291 (1969), holding that the jurisdiction of military courts-martial could not constitutionally extend to the alleged criminal conduct which was not "service-connected," and was committed out of uniform, on leave, off the military base and in a district, Hawaii, where civil courts were open. It held that plaintiff was denied his right to trial in such a civilian tribunal with the attendant rights of an indictment by a grand jury and a trial by jury. This decision voided the conviction and sentence, including plaintiff's dishonorable discharge.

On October 6, 1969, plaintiff commenced this action, proceedings in which were stayed in order for plaintiff to seek a review by the Board For The Correction of Military Records (hereafter Board) to settle plaintiff's military status. The Under Secretary of the Army, under date of January 12, 1971, and pursuant to Board recommendation, has nullified plaintiff's dishonorable discharge; discharged him honorably as of March 8, 1961, the expiration date of his enlistment contract in force at the time of his purported conviction; and denied him any connection with the Army after March 8, 1961.

Plaintiff says the Under Secretary of the Army abused his discretion in backdating the discharge to the end of the enlistment, and urges that he had never been properly discharged from the service until the time of action of the Board. The Government insists that the Secretary acted wholly within his discretion and, in any event, any cause of action accrued more than six years before this action was filed. Thus, the Government argues, the six-year statute of limitations on actions in this court, 28 U.S.C. § 2501 (1970), precludes this claim.

In order to reach the statute of limitations issue we must dispose of the threshold question of the time of accrual of the cause of action which requires analysis of the decisions of the Board and the Secretary.

The plaintiff's position proceeds as follows: when the Board replaced his dishonorable discharge with an honorable one, it attempted to make the discharge retroactive to March 8, 1961. Plaintiff says it can do the first but not the second. Since he had never been properly discharged before the date of the correction, that date should be the effective date of his new discharge. Thus, plaintiff continues, he is entitled to all pay and allowances for the intervening time. This line of logic has been argued before this court on many occasions and it has been consistently rejected, the court uniformly limiting recovery for unlawful discharge to the period between the date of the discharge and the date of the expiration of the enlistment contract had the prior defective discharge not occurred. E.g., Middleton v. United States, 170 Ct. Cl. 36 (1965); Sofranoff v. United States, 165 Ct. Cl. 470 (1964); Clackum v. United States, 161 Ct. Cl. 34 (1963); Smith v. United States, 155 Ct. Cl. 682 (1961); Murray v. United States, 154 Ct. Cl. 185 (1961). This disposition is based on sound, time-honored contract principles, namely that neither party to a contract is bound beyond that for which he has bargained. Cases cited by plaintiff support this view. In Garner v. United States, 161 Ct. Cl. 73 (1963), the enlistment in question was indefinite, having no expiration date; therefore the date of the second, proper honorable discharge was used as the benchmark for determining the amount of recovery due.

Officers' commissions are generally of indefinite duration. Shaw v. United States, 357 F.2d 949, 174 Ct. Cl. 899 (1966), indicates that an officer remains an officer indefinitely, despite an invalid conviction and discharge. In Motto v. United States, 172 Ct. Cl. 192, 348 F.2d 523 (1965), and again in Hamlin v. United States, 183 Ct. Cl. 137, 391 F.2d 941 (1968), the claimants also held commissions of indefinite duration. We determined, for reasons that will appear, that the Board review was a mandatory step, without which plaintiffs had no cause of action and therefore that the date of the Board's decision was the date of accrual of the action since no other reasonable one was available. One judge in Hamlin would have predicated the result on different grounds, not here applicable. A distinguishing fact in Motto and Hamlin we think, is the different status of persons in the Armed Forces, who have indefinite commissions.

The Motto and Hamlin plaintiffs were Army officers who had been civilly convicted for bribery. Later the Secretary of the Army dismissed them, because 18 U.S.C. § 202 automatically forfeits offices such as theirs in case of conviction for that kind of offense. Still later the District Court voided their convictions, but McMullen v. United States, 100 Ct. Cl. 323 (1943), cert. denied, 321 U.S. 790, 64 S. Ct. 786, 88 L. Ed. 1080 (1944), stood as authority that the forfeiture remained effective despite such avoidance, and without administrative correction, it follows that a suit here would not lie. The Secretary corrected their records, giving honorable discharges, effective the dates of dismissal, but a majority of this court held that plaintiffs could simultaneously

take advantage of the new discharge and repudiate the effective date the Secretary had selected. The cases turned on the unique legal situation presented and do not establish any general rule that corrective honorable discharges cannot be backdated when it is reasonable and not arbitrary or capricious to backdate.

....

Plaintiff asks this court to find the actions of the Board and the Secretary in "backdating" his discharge to the date of enlistment expiration to be arbitrary, capricious and outside the discretion vested with their offices. The issue, most clearly stated, is whether the Secretary of any service arm is required to postulate a re-enlistment without exercise of discretion in individual cases. We think that he is not. The principles of efficient management, maintenance of morale, and the continued public trust in our Armed Services require that more substantial discretion be left in the hands of those who manage and maintain the Armed Services. Assume for the moment that plaintiff's conviction had been voided prior to the end of his enlistment and that he were free at that time to apply for re-enlistment, and that he actually harbored the intent to do so. We may note that in O'Callahan the Supreme Court does not pretend to be correcting an unjust conviction. It starts right out by reciting that he committed the offenses charged. Would the Secretary have been compelled to accept plaintiff's enlistment, knowing what he had done? Again, we think not. Cf. Davis v. United States, Ct. Cl. (decided November 12, 1971).

....

The issue of when an action based on alleged illegal discharge accrues is not new to this court. In Mathis v. United States, 183 Ct. Cl. 145, 391 F.2d 938 (1968), we held it accrued all at once on the date of discharge. . . .

(iii) Nonappropriated Fund (NAFI) Employees. Absent a contract, nonappropriated fund employees are generally precluded from seeking back pay from the United States under the Tucker Act, as they are expressly excluded from coverage under the Back Pay Act.⁸⁹ Nor were there any other constitutional, statutory, or regulatory provisions that entitled such employees to recover back pay from the government. The absence of a back pay remedy for nonappropriated fund

⁸⁹See 5 U.S.C. § 2105(c)(1).

employees was the subject of the Supreme Court's decision in Army & Air Force Exchange Service v. Sheehan.

ARMY AND AIR FORCE EXCHANGE SERVICE v.
SHEEHAN
456 U.S. 728 (1982)

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented by this case is whether the federal courts have jurisdiction over a civil action for monetary damages brought by a former military exchange employee who contests the validity of his discharge. The employee claims that federal jurisdiction exists under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976 ed., Supp. IV).

I

A

In 1962, respondent, Arthur Edward Sheehan, was selected for a data processing position with petitioner Army and Air Force Exchange Service (AAFES or Service). Five years later, respondent was designated by the AAFES commander for participation in the Service's Executive Management Program (EMP); this program is "intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES." Army Regulation (AR) 60-21/Air Force Regulation (AFR) 145-15, ch. 5, § 11, para. 5-6 (1 Aug. 1979). Employees in the program enjoy special retention, insurance, and retirement benefits. On the other hand, those employees are subject to certain obligations, a principal one being that EMP personnel must accept transfer to any AAFES facility in this country or abroad. Para. 5-9(a)(2). EMP status may be withdrawn for, among other things, "conduct off the job reflecting discredit upon AAFES." Para. 5-9(c). Pursuant to the regulations governing the EMP, respondent was required to "acknowledg[e] in writing that he underst[ood] and accept[ed] the conditions of the EMP as prescribed by the Commander, AAFES." Para. 5-7(b).

In 1975, while respondent was serving as a shopping center manager at Fort Jackson, S.C., he was arrested off the base for possession of controlled substances. Pursuant to a plea bargain, respondent pleaded guilty to four misdemeanor counts of

violating state drug laws. He was sentenced to 18 months probation and a \$1,000 fine was imposed.

[On April 19, 1976, respondent was separated from the service for cause. Ultimately, his appeals were denied. Pending resolution of his appeals, respondent filed suit against AAFES in the District Court for the Northern District of Texas. He sought reinstatement and damages, including backpay.]

The District Court, without opinion, dismissed the complaint for want of subject-matter jurisdiction. App. to Pet. for Cert. 17a.

The United States Court of Appeals for the Fifth Circuit reversed. It concluded that the Tucker Act, 28 U.S.C. § 1346(a)(2), which gives the federal courts jurisdiction over certain suits against the United States founded upon express or implied contracts, provided a basis for jurisdiction over respondents claims for monetary relief. 619 F.2d 1132 (1980). Whether respondent's employment was initiated by appointment or by contract, the court held, the AAFES regulations providing for separation for cause only under certain conditions and guaranteeing an administrative appeal "manifest[ed] the understanding of the parties concerning discharge procedures while Sheehan continued in AAFES employment." *Id.*, at 1138 (emphasis in original). Accordingly, the court considered those regulations to be "part of a collateral implied-in-fact contract between Sheehan and the AAFES that the AAFES would adhere to the regulations in its dealings with him." *Ibid.* In the court's view, the understanding of the parties was reinforced by the well-established legal principle that a federal agency must comply with its own regulations. The court concluded that respondent's allegation that his dismissal violated applicable regulations was "equivalent to an allegation of breach of an implied-in-fact contract," *ibid.*, and that the District Court therefore had erred in ruling that it had no jurisdiction to award respondent monetary relief.

Because this ruling appeared to be in conflict with our precedents, we granted certiorari. 454 U.S. 813 (1981).

II

The AAFES, like other military exchanges, is an "ar[m] of the government deemed by it essential for the performance of governmental functions . . . and partake[s] of whatever immunities it may have under the constitution and federal statutes." United States v. Mississippi Tax Comm'n, 421 U.S. 599, 606 (1975), quoting, with approval, language of the District Court in the same case, 378 F. Supp. 558, 562-563 (SD Miss. 1974). As a result, the federal courts may entertain actions against the Service only if Congress has consented to suit; "a waiver of the traditional sovereign immunity 'cannot

be implied but must be unequivocally expressed." United States v. Testan, 924 U.S. 392, 399 (1976), quoting United States v. King, 395 U.S. 1, 4 (1969).

The Tucker Act effects one such explicit waiver when it provides in pertinent part:

"The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

". . . Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service . . . shall be considered an express or implied contract with the United States." 28 U.S.C. §346(a)(2) (1976 ed., Supp. IV) (emphasis added).

Respondent does not assert Tucker Act jurisdiction on the basis of the Constitution or a specific statute or regulation. He claims only that the Tucker Act affords him a remedy because of an "express or implied contract with the United States" agreed to by the parties. Specifically, respondent urges that he became an AAFES employee, or at least entered the EMP, by virtue of an employment contract, not by appointment, and that the AAFES regulations governing dismissal of employees created an implied contract. We must reject both contentions.

A

In determining whether respondent's employment was the result of appointment or contract, we look to United States v. Hopkins, 427 U.S. 123 (1976), a wrongful-discharge action brought by an AAFES employee who alleged that his separation from the Service constituted a breach of an employment contract. The Court in its per curiam opinion in Hopkins noted that Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods or other services, id., at 126, and that the AAFES regulations authorize the Service to enter into service contracts. Id., at 127-128. But the Court also observed that many AAFES employees are appointed to their positions, and it remanded the case for consideration of the question whether the plaintiff had been employed by contract or by appointment, a determination dependent upon "an analysis of the statutes and regulations previously described in light of

whatever evidence is adduced on remand as to plaintiff's particular status in this case." Id., at 130.

Although respondent alleges that he was employed, both initially and upon entering EMP, by express employment contracts, he points to nothing in the record or in the relevant AAFES regulations that substantiates that claim. In fact, his complaint supports the contrary view. The complaint observes that respondent was first "employed" by the AAFES in 1962, App. 3; the regulations pertaining to "employees" refer to Service personnel as "Federal employees of an instrumentality of the United States" who are appointed to their positions. AR 60-21/AFR 147-15, ch. 1, § 1, para. 1-6(a); ch. 2, § 1, paras. 2-2, 2-3 (1 Aug. 1979). Moreover, if, as respondent alleges, he was "employed" in a data processing position, AAFES regulations prohibit the Service from negotiating a contract with him. See AR 60-20/AFR 147-14, ch. 3, § III, para. 3-26(d) (15 Nov. 1978).

Respondent's selection to the EMP plainly was pursuant to appointment. The regulations governing the EMP appear in the provision entitled "Exchange Service Personnel Policies," AR 60-21/AFR 147-15, ch. 5, § II, rather than in the regulation providing for service contracts, AR 60-20/AFR 147-14, ch. 3, §§ II, III. And, in language that connotes appointment rather than contract, the EMP regulations refer to one's "nomination, selection, and designation to EMP status," AR 60-21/AFR 147-15, ch. 5, § II, para. 5-8. Furthermore, respondent complains that he was separated from the EMP in violation of discharge procedures described in the regulation applicable to appointed employees, not to those who have contracted with the AAFES to provide services. App. 4-5, 7; see AR 60-21/AFR 147-15, ch.3

....

B

The Court of Appeals' decision rests on a different theory--that, whether or not respondent was initially employed by virtue of a contract or by appointment, the AAFES regulations governing separation procedures created an implied-in-fact contract that the Service would adhere to those regulations while respondent continued in AAFES employment. This approach, however, is foreclosed by our prior decisions.

In United States v. Testan, 424 U.S. 392 (1976), the Court concluded, without dissent, that the Tucker Act did not confer jurisdiction over a complaint filed by civil service employees who claimed that they were entitled to reclassification at a higher grade. The Act, the Court observed, "is itself only a jurisdictional statute; it does not

create any substantive right enforceable against the United States for money damages." Id., at 398. Rather, a plaintiff's "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id., at 400, quoting Eastport S. S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967). The Court explicitly rejected the argument that "the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages." 424 U.S., at 401; see also United States v. Hopkins, 427 U.S., at 130.

As Testan makes clear, jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages." Respondent cannot escape the force of Testan by relying on the Court's observation that plaintiffs in that case did not "rest their claims upon a contract," 424 U.S., at 400, and distinguishing this case on the ground that the regulations effected an implied contract. To accept this reasoning would be to undermine the Court's ruling in Testan that the Tucker Act provides a remedy only where damages against the United States have been authorized explicitly. Admittedly, the Testan plaintiffs did not assert the existence of an employment contract, but neither did respondent until very late in the litigation. And if employment statutes and regulations create an implied-in-fact contract, surely the Court would have so noted in Testan instead of directing that the complaint be dismissed. See id., at 408. Moreover, the plaintiff in Hopkins did claim that he had been employed pursuant to a contract; the Court's remand for consideration of the plaintiff's status as an appointed or contract employee, despite a claim that his discharge contravened applicable regulations, clearly suggests that employment regulations do not automatically give rise to an implied in fact contract.

In addition to mandating different results in Testan and Hopkins, the Court of Appeals' approach would "rende[r] superfluous" "many of the federal statutes--such as the Back Pay Act--that expressly provide money damages as a remedy against the United States in carefully limited circumstances." United States v. Testan, 424 U.S., at 404. The Back Pay Act, which permits an employee to recover lost wages due to "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled, 5 U.S.C. §5596(b)(1) (1976 ed., Supp. IV), expressly denies that cause of action to AAFES personnel. See 5 U.S.C. 2105(c)(1) (1976 ed., Supp. IV). Congress' intent to prohibit a backpay claim by a Service employee would obviously be subverted if the employee could sue under the Tucker Act whenever he asserted a violation of the Service's regulations governing termination. And the impact of the Court of Appeals' decision would not be limited to such circumstances: as counsel for respondent

appeared to concede at oral argument, the Court of Appeals' reasoning would extend Tucker Act jurisdiction to reach any complaint filed by a federal employee alleging the violation of a personnel statute or regulation. Tr. of Oral Arg. 20-21.

We therefore conclude that Testan is controlling, and we hold that the Court of Appeals erred in implying a contract based solely on the existence of AAFES personnel regulations and in premising Tucker Act jurisdiction on those regulations, which do not explicitly authorize damage awards. Because the court's judgment may not be sustained on the ground that respondent was hired pursuant to an express employment contract, we find that the Tucker Act did not confer jurisdiction over respondent's claim for monetary relief.

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.⁹⁰

Following the Sheehan decision, the Army and Air Force Exchange Service (AAFES) adopted the provisions of the Back Pay Act by regulation.⁹¹ This regulatory provision now provides the AAFES employee a substantive basis for relief under the Tucker Act.

(c) Other Issues.

(i) Statute of Limitations. An action under the Tucker Act must be filed within six years of the date on which it accrues.⁹² Generally, "a claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle

⁹⁰See Lunetto v. United States, 560 F. Supp. 712 (N.D. Ill. 1983) (Navy Exchange Service).

⁹¹Dep't of Army, Reg. No. 60-21, para. 1-7g; Dep't of Air Force, Reg. No. 147-15, para. 1-7g.

⁹²28 U.S.C. §§ 2401(a), 2501 (1982).

the claimant to institute an action.⁹³ In cases where a plaintiff's claim is based on an alleged illegal discharge from the military, the claim normally first accrues on the date of separation from the service.⁹⁴

Where former military personnel challenge putatively illegal court-martial convictions, the statute begins to run on the date of conviction.⁹⁵ And in cases involving purportedly unlawful promotion passovers, the claims accrue on the date promotion is denied.⁹⁶ Failure to bring an action within the statute of limitations is a jurisdictional bar to suit.⁹⁷

(ii) Appeals in Tucker Act Cases. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims and from a district court if the jurisdiction of the district court was based, in whole or in part, on the Tucker Act.⁹⁸ The appeal of Tucker Act cases is discussed in greater detail in chapter 3.⁹⁹

⁹³*Oceania Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964). See *Kirby v. United States*, 201 Ct. Cl. 527, 532-33 (1973).

⁹⁴*Mathis v. United States*, 391 F.2d 938 (Ct. Cl.), vacated on other grounds, 394 F.2d 519 (Ct. Cl. 1968); *Walter v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983).

⁹⁵*Calhoun v. Lehman*, 725 F.2d 115, 117 (D.C. Cir. 1983); *Brewster v. Sec'y of Army*, 489 F. Supp. 85 (E.D.N.Y. 1980).

⁹⁶*Brownfield v. United States*, 589 F.2d 1035 (Ct. Cl. 1978).

⁹⁷*United States v. Sams*, 521 F.2d 421, 429 (3d Cir. 1975); *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1357 (5th Cir. 1972); *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968); *Konecny v. United States*, 388 F.2d 59, 62 (8th Cir. 1967); *Bruno v. United States*, 556 F.2d 1104, 1105 (Ct. Cl. 1977). See § 3.1(d) (effect of exhaustion of remedies on the statute of limitations).

⁹⁸28 U.S.C. §§ 1295(a)(2), (3).

⁹⁹See supra § 3.3c(5).

c. Mandamus. "Historically, as well as under § 1361, the writ of mandamus [has] been considered an extraordinary remedy, to be issued only under extraordinary circumstances."¹⁰⁰ To demonstrate the right to mandamus relief, a plaintiff must establish three elements: (1) a clear right to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.¹⁰¹ Carter v. Seamans best illustrates the application of these prerequisites to mandamus relief, especially the availability of other adequate remedies.

CARTER v. SEAMANS
411 F.2d 767 (5th Cir. 1969),
cert. denied, 397 U.S. 941 (1970)

The Plaintiff, Albert H. Carter, was discharged from the United States Air Force "under other than honorable conditions" on December 29, 1960. His discharge was purportedly effected pursuant to the provisions of 10 U.S.C. Sec. 1163(a) as implemented by Air Force Regulation 36-2. At the time of the discharge, Plaintiff held the rank of Captain and he had over three years of active commissioned service. Contending that his discharge was in violation of his constitutional rights and/or was contrary to law, and hence a legal nullity, Carter brought this action against the Secretary of the Air Force in order to have it set aside. The specific relief sought includes, inter alia, a declaratory judgment that the discharge was illegal and invalid and that Plaintiff has continued to hold his office and commission at all times since December 29, 1960. Carter also asks the court to find that he is entitled to have his military

¹⁰⁰Cook v. Arentzen, 582 F.2d 870, 876 (4th Cir. 1978). See also Smith v. Northern La. Medical Review Ass'n, 735 F.2d 168, 172 (5th Cir. 1984); Haneke v. Secretary of Health, Educ., & Welfare, 535 F.2d 1291, 1296 (D.C. Cir. 1976); In re Cessna Distributorship Antitrust Litigation, 532 F.2d 64, 68 (8th Cir. 1976); Atwell v. Orr, 589 F. Supp. 511, 516 (D.S.C. 1984).

¹⁰¹Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987); Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986); Turner v. Weinberger, 728 F.2d 751, 755 (5th Cir. 1984); Cook v. Arentzen, 582 F.2d 870, 876 (4th Cir. 1978); City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976); Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989); Atwell v. Orr, 589 F. Supp. 511, 516 (D.S.C. 1984). See also Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo. L.J. 19, 25 (1964).

records corrected so as to reflect that he has been promoted at regular intervals and that he now holds the rank of Colonel. Finally, he seeks an injunction restraining the defendant from further withholding all pay and allowances he would have earned during the relevant period and which may accrue in the future. It has been estimated that the claim, if paid in full, would involve approximately \$135,000.

It is noteworthy that Carter is the plaintiff in an action in the United States Court of Claims styled Albert H. Carter v. United States which was filed on April 14, 1966. The action in the Court of Claims arose out of the same factual situation as the case at bar and it seeks similar relief. On April 26, 1968, the seven judges of the court, in a per curiam order, denied the government's motion to dismiss and ordered, sua sponte, that all proceedings be stayed pending this court's disposition of the instant case.

. . . .

The defendant's second and more substantial jurisdictional objection is premised on the notion that insofar as the instant case represents a claim for monetary relief, the court is without jurisdiction to grant such relief by reason of the fact that the amount claimed exceeds \$10,000. Pointing to the Tucker Act (28 U.S.C. Sec. 1346(a)(2)), defendant argues that exclusive jurisdiction of this case is lodged in the Court of Claims.

In assaying this contention the initial inquiry must be to what extent, if at all, this case represents a claim for monetary relief. The pivotal theory around which Plaintiff's entire case revolves is that his separation from the Air Force was so fundamentally defective as to be a complete legal nullity. Plaintiff, thus, is challenging the fact of discharge rather than merely its character. Inherent in this theory is the contention that Plaintiff has been, in contemplation of law at least, an officer on active duty status at all times since December, 1960. If this theory is accepted and carried to its logical consequence, as Plaintiff insists it must, the result would be that Carter is entitled to full pay and allowances from the last day of 1960 to the present. Hence, by virtue of Plaintiff's theory of the case, a decision by this court concerning the validity of the discharge necessarily involves an adjudication of the claim for back wages. This view of the case is buttressed by the nature of the relief prayed for. In paragraph "19" of the prayer for judgment, as amended, Carter asks for an order:

"* * * permanently enjoining the defendant from * * * withholding * * * any privilege, benefit, right, property, pay, and allowance to which Plaintiff might lawfully be entitled as an incident to his military office, grade and status."

Under the circumstances the court must conclude that the claim for back pay and allowances constitutes the keystone of this entire law suit. That the complaint is cast in terms of a declaratory judgment action cannot alter the fact that what in substance is sought is a money judgment against the United States for back pay in excess of \$10,000.

Simply stated the issue now becomes whether this court has jurisdiction of such a cause of action.

If, as the defendant contends, jurisdiction of the case sub judice is available only under the aegis of Section 1346, Title 28, U.S.C., there can be no doubt that this court is without power to resolve the controversy. Prior to 1964, Subsection (d)(2) of Section 1346 barred the district courts from adjudicating any civil action brought by an officer of the United States to recover fees, salary or compensation. See, e.g., Bruner v. United States, 343 U.S. 112, . . . (1952). At that time the Court of Claims had exclusive jurisdiction of such cases regardless of the amount claimed. In 1964, however, Subsection (d)(2) was deleted by Congress and as a consequence Subsection (a)(2) is now applicable to cases involving claims by officers for back pay. The present status of the law is that the district courts have concurrent jurisdiction with the Court of Claims over such cases, provided that the amount of the claim does not exceed \$10,000. Since both parties admit that the claim in the instant case does exceed \$10,000, it would seem that the Court of Claims is the only forum having jurisdiction unless there is some jurisdictional fount other than Section 1346.

In rejoinder the Plaintiff asserts that Section 1361, Title 28, U.S.C., provides the requisite alternate jurisdictional basis. In disarmingly simplistic language Section 1361 provides:

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Using this statute as his starting point, Carter argues that 10 U.S.C. Sec. 1552 imposes on the Secretary of the Air Force an absolute duty to correct an applicant's military records where this is necessary to "correct an error or remove an injustice." Since, Plaintiff continues, his entitlement to correction of his military records is unequivocally demonstrated by the pleadings and stipulation, and since the Secretary wrongly refused to grant such relief, an action will lie under Section 1361 to remedy the defendant's abuse of discretion.

Assuming arguendo that Plaintiff's discharge was illegal, the argument recited by Plaintiff is incontrovertible as far as it goes. Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965), teaches that Section 1361 gives the district courts jurisdiction to review and correct administrative action taken pursuant to Section 1552 where it is alleged and proved that the discharge in question was a legal nullity. Accord, Van Bourg v. Nitze, 128 U.S. App. D.C. 301, 388 F.2d 557 (1967); Smith v. United States Air Force, 280 F. Supp. 478 (E.D. Pa. 1968).

On the basis of the foregoing authorities the court has jurisdiction but the Ashe, Van Bourg, and Smith cases are not entirely dispositive since, unlike Carter, each involved plaintiffs who were challenging only the character of their discharges. While Section 1361 confers jurisdiction as such, the question whether it authorizes this court to effect the Plaintiff's de jure reinstatement into the Air Force and to award him monetary relief in excess of \$10,000 remains unanswered.

The courts that have construed Section 1361 have uniformly held that its sole function was merely to extend to all district courts the mandamus jurisdiction formerly exercised only by the District Court for the District of Columbia. The same authorities also emphasize that the provision in question did not make any substantive change in the law of mandamus. The prevailing interpretation of Section 1361 was concisely summarized by Judge Conner in Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88 (D.N.H. 1963), when he wrote:

"Therefore, if the plaintiff could not have obtained relief before the enactment of § 1361, he is in no better position now."

Id. at 90. The determinative issue, then, is whether under general principles of law mandamus provides an appropriate means for obtaining the relief prayed for in this case.

It is hornbook law that mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases. Though it is a legal remedy, it is largely controlled by equitable principles and its issuance is a matter of judicial discretion. Generally speaking, before the writ of mandamus may properly issue three elements must coexist: (1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. In connection with the last requirement, it is important to bear in mind that mandamus does not supersede other remedies, but rather comes into play where there is a want of such remedies. Admittedly the alternative remedy must be adequate, i.e., capable of affording full relief as to the very subject matter in question.

After giving the matter careful study, I am constrained to hold that an alternate remedy is available to the Plaintiff in the form of an action in the Court of Claims. Certain it is that 28 U.S.C. Sec. 1491 empowers the Court of Claims to declare a serviceman's discharge legally inoperative and to award him back pay when this is the case. And, the court has, in fact, done just this a number of times. In his brief Plaintiff suggests that he is entitled to a disability retirement. The Court of Claims may grant this type of relief. Finally, Carter prays for a declaration that he was promoted to the rank of Colonel on November 24, 1967. This relief is likewise available in the Court of Claims in the proper circumstances. Thus, even the most cursory examination of the foregoing authorities evidences that not only is an adequate remedy available to Plaintiff in the Court of Claims, but also that that court has acquired considerable expertise in this type of litigation. This court would do well to defer to such expertise. . . .

. . . .

The court therefore concludes that it would be improper to grant relief in this case by way of mandamus because the Plaintiff has another adequate remedy.¹⁰²

Even where no other adequate remedy is available, the plaintiff still must establish a clear right to the relief sought and a clear duty on the part of the defendant to do the act in question. In this regard, mandamus generally will issue only in cases in which the act sought to be compelled is "ministerial," rather than "discretionary," in character.¹⁰³ This "ministerial-discretionary" dichotomy has been the

¹⁰²See *Matthews v. United States*, 810 F.2d 109, 113 (6th Cir. 1987); *Towers v. Horner*, 791 F.2d 1244, 1247 (5th Cir. 1986); *Fairview Township v. United States EPA*, 773 F.2d 517, 528 (3d Cir. 1985); *Borntrager v. Stevas*, 772 F.2d 419, 420 (8th Cir.), cert. denied, 474 U.S. 1008 (1985); *United States v. O'Neil*, 767 F.2d 1111, 1113 (5th Cir. 1985).

¹⁰³E.g., *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930); *Harris v. Birmingham Bd. of Educ.*, 817 F.2d 1525, 1526 (5th Cir. 1987); *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949, 951 (3d Cir. 1987); *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986); *Pescosolido v. Block*, 765 F.2d 827, 829 (9th Cir. 1985); *Smith v. Grimm*, 534 F.2d 1346, 1351 (9th Cir.), cert. denied, 429 U.S. 980 (1976); *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973); *Rippenburg v. United States*, 631 F. Supp. 1230 (W.D. Mich. 1986).

subject of intense academic criticism.¹⁰⁴ Moreover, especially in cases involving review of military correction board decisions, in the past 20 years courts have become more willing to use mandamus to determine the existence of an abuse of discretion.¹⁰⁵

d. Habeas Corpus. As noted previously,¹⁰⁶ habeas corpus is the principal means of challenging unlawful custody or confinement. Two jurisdictional prerequisites exist for habeas relief. First, the petitioner must be in custody.¹⁰⁷ Both court-martial sentences of confinement and involuntary military service provide the necessary custody for habeas corpus.¹⁰⁸ Second, the petition must be filed in the judicial district where the custodian and the servicemember are located.¹⁰⁹ The custodian of servicemembers will vary depending on the type of custody being challenged--imprisonment or military service--and, if military service is at issue, the military component--Regular or Reserve--of the petitioner. The following cases illustrate this issue well.

(1) Imprisonment.

¹⁰⁴E.g., 4 K. Davis, *Administrative Law Treatise* §§ 23:12-23:13 (1983); Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 331-36 (1967).

¹⁰⁵E.g., *Homcy v. Resor*, 455 F.2d 1345, 1348-49 (D.C. Cir. 1971); *Haines v. United States*, 453 F.2d 233, 236 (3d Cir. 1971); *Angle v. Laird*, 429 F.2d 892, 893 (10th Cir. 1970), cert. denied, 401 U.S. 918 (1971); *Ragoni v. United States*, 424 F.2d 261, 263 (3d Cir. 1970); *Ashe v. McNamara*, 355 F.2d 277, 282 (1st Cir. 1965); *Mulvaney v. Stetson*, 544 F. Supp. 811, 814-15 (N.D. Ill. 1982).

¹⁰⁶See supra § 3.3.

¹⁰⁷Id.

¹⁰⁸Id.

¹⁰⁹See, e.g., *Hajduk v. United States*, 764 F.2d 795, 796 (11th Cir. 1985); *Centa v. Stone*, 755 F. Supp. 197 (N.D. Ohio 1991).

SCOTT v. UNITED STATES
586 F. Supp. 66 (E.D. Va. 1984)
MEMORANDUM OPINION

RICHARD L. WILLIAMS, District Judge.

I. Factual Background

From October 3 through October 12, 1983, Petitioner Lindsey Scott was tried by general court martial in Quantico, Virginia, and convicted of four charges involving rape, sodomy, and attempted murder. Scott was sentenced to have his pay grade reduced to E-1, to be confined to hard labor for thirty years, to forfeit \$500.00 pay per month for thirty-six months, and to be dishonorably discharged from the United States Marine Corps. He was sent to the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas for confinement pending completion of appellate review. Petitioner Scott's record is presently before the U.S. Navy-Marine Corps Court of Military Review (NMCMR) pursuant to the mandatory review procedures established by Article 65(a) and 66(b), Uniform Code of Military Justice, 10 U.S.C. §§ 865(a), 866(b).

On March 13, 1984, the Petitioner filed this action requesting a writ of habeas corpus from this Court. Petitioner contends that he did not receive effective assistance of counsel at his general court martial. Scott alleges that his counsel was totally unprepared for trial. He claims that neither his counsel nor co-counsel interviewed key defense witnesses prior to putting them on the stand. The Petitioner has attached the affidavits of seven defense witnesses (two of whom are allegedly alibi witnesses) who categorically state that counsel for defendant Scott did not interview them before trial.

This matter comes before the Court on the Government's Motion to Dismiss either for lack of jurisdiction or for petitioner's failure to exhaust his military appellate remedies. For reasons stated in more detail below, this Court grants the Government's Motion to Dismiss.

II. Legal Analysis

A. Motion to Dismiss for Lack of Jurisdiction.

In his complaint, Petitioner Scott alleges 28 U.S.C. § 2255 as the jurisdictional basis for asserting his claims in this Court. That statute grants jurisdiction over a criminal defendant's challenges to his conviction through a habeas corpus petition to the court that sentenced that criminal defendant. Since this Court did not sentence Petitioner

Scott, 28 U.S.C. § 2255 is not a proper jurisdictional basis for the instant habeas corpus petition.

In the alternative, Petitioner Scott requests leave to amend his Complaint in order to allege 28 U.S.C. § 2241 as the proper ground for this Court's jurisdiction over the case. That statute establishes jurisdiction in federal courts to hear those habeas corpus petitions "within their respective jurisdictions." 28 U.S.C. § 2241(a). Under this provision, a habeas corpus petition is within a court's jurisdiction if either the petitioner or his custodian is within the court's district. 28 U.S.C. § 2241(a); Rules 2 and 3 following 28 U.S.C. 2254. See also Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 495, 93 S. Ct. 1123, 1129, 35 L. Ed.2d 443 (1972); U.S. v. Monteer, 556 F.2d 880, 881 (8th Cir. 1977); Andrino v. U.S. Board of Parole, 550 F.2d 519, 520 (9th Cir. 1977). While it is true that in the present case, Petitioner Scott's court martial took place in Quantico, Virginia, an area within this Court's district, the Petitioner himself is presently confined in Fort Leavenworth, Kansas, a location outside the district governed by this Court. See Local Rule 3(B)(1). The bone of contention between the two parties is whether petitioner's custodian is within this Court's district. The Government claims that the Petitioner's custodian is the warden of the facility at which Petitioner Scott is incarcerated. Petitioner Scott argues that his custodian is either the Secretary of the Navy or the Commandant of the Marine Corps since each has authority over the "mitigation, remission and suspension of sentences, parole, restoration to duty, and transfer to Federal institutions." See Statement of Understanding Concerning Disposition of Corrections Matters Relating to Marine Corps Prisoners Confined at the U.S. Disciplinary Barracks, Exhibit A to Petitioner's Opposition to the Government's Motion for Summary Judgment filed May 9, 1984. If the Government is correct that the Petitioner's custodian is the warden of the U.S. Disciplinary Barracks of Fort Leavenworth, Kansas, then this Court does not have jurisdiction to entertain the instant habeas corpus petition since neither the petitioner nor his custodian are within this Court's district. However, if Petitioner Scott is correct that his custodian is either the Secretary of the Navy or the Commandant of the Marine Corps, then this Court has jurisdiction over the present petition since both of these individuals are located within the district governed by this Court.

The appropriate respondent in a habeas corpus petition is the petitioner's immediate custodian, the warden or superintendent of the facility in which the petitioner is incarcerated. Just as the state itself, its attorney general, and its director of corrections are not considered custodians of state prisoners for habeas corpus purposes, neither are the Secretary of the Navy and the Commandant of the Marine Corps considered custodians of individuals convicted of crimes by the military justice system. Instead, the warden or superintendent of the Disciplinary Barracks in which the

military prisoner is incarcerated is the legal custodian under federal habeas corpus principles.

As a result, this Court finds that it does not have jurisdiction to consider Petitioner Scott's habeas corpus petition since neither Scott nor his custodian, the warden of the U.S. Disciplinary Barracks in Fort Leavenworth, Kansas, are within the jurisdiction of this Court.

. . . .

(2) Military Service--Active Duty.

SCHLANGER v. SEAMANS
401 U.S. 487 (1971)

The sole question in this case is whether the District Court for the District of Arizona had jurisdiction to entertain on the merits petitioner's application for a writ of habeas corpus. He is an enlisted man who was accepted in the Airman's Education and Commissioning Program, an officer training project, and was assigned to Wright-Patterson Air Force Base (AFB), Ohio, "with duty at Arizona State University" for training. While studying in Arizona and before completion of the course, he was removed from the program, allegedly for engaging in civil rights activities on the campus.

While he was seeking administrative relief through command channels, he was reassigned to Moody AFB, Georgia, to complete the remainder of his six year re-enlistment in a noncommissioned status. After exhausting those remedies he was given permissive temporary duty to attend Arizona State for study, this time by his superiors at Moody AFB under a different program called Operation Bootstrap, and at his own expense.

Thereafter he filed his application for habeas corpus in Arizona alleging that his enlistment contract had been breached and that he was being detained unlawfully. The District Court denied the application. The Court of Appeals affirmed on the basis of Jerrett v. Resor, 426 F.2d 213. The case is here on a petition of certiorari which we granted. 400 U.S. 865

The respondents to this suit are the Secretary of the Air Force, the Commander of Moody AFB, and the Commander of the AF ROTC program on the Arizona State campus. The last respondent was the only one of the three present in Arizona and he had no control over petitioner who concededly was not in his chain of command, since petitioner was not in the AF ROTC program, but in Operation Bootstrap. The commanding officer at Moody AFB in Georgia did have custody and control over petitioner; but he was neither a resident of the Arizona judicial district nor amenable to its process.

It is true, of course, that the commanding officer at Moody AFB exerted control over petitioner in the sense that his arm was long and petitioner was effectively subject to his orders and directions. There are cases which suggest that such control to establish custody may be adequate for habeas corpus jurisdiction even though the control is exercised from a point located outside the State, as long as the petitioner is in the district or the State. Donigian v. Laird, 308 F. Supp. 449. For reasons to be stated, we do not reach that question.

The procedure governing issuance of the writ is provided by statute. The federal courts may grant the writ "within their respective jurisdictions." 28 U.S.C. § 2241(a). While the Act speaks of "a prisoner" (28 U.S.C. § 2241(c)), the term has been liberally construed to include members of the armed services who have been unlawfully detained, restrained, or confined. Eagles v. Samuels, 329 U.S. 304, 312, 91 L.Ed. 308, 314, 67 S. Ct. 313. The Act extends to those "in custody under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the District Court. In Ahrens v. Clark, 335 U.S. 188, . . . we held that it was not sufficient if the custodian alone be found in the jurisdiction where the persons detained were outside the jurisdiction and that jurisdiction over the respondent was territorial. The dissent in that case thought that the critical element was not where the applicant was confined but where the custodian was located; that if the custodian were in the territorial jurisdiction of the District Court, then appropriate relief could be effected.

Whichever view is taken of the problem in Ahrens v. Clark, the case is of little help here. For while petitioner is within the territorial jurisdiction of the District Court, the custodian--the Commander of Moody AFB--is not. In other words, even under the minority view in Ahrens v. Clark, the District Court in Arizona has no custodian within its reach against whom its writ can run. Hence, even if we assume that petitioner is "in custody" in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement (Jones v. Cunningham, 371 U.S. 236, 240, 9 L.Ed.2d 285, 289, 83 S. Ct. 373, 92 A.L.R.2d 675) the absence of his

custodian is fatal to the jurisdiction of the Arizona District Court. Cf. Rudick v. Laird, 412 F.2d 16, 21.

Had petitioner, at the time of the filing of the petition, been under the command of the Air Force officer assigned as liaison officer at Arizona State to supervise the Education and Commissioning Program, we would have a different question. We do not reach it nor do we reach any aspects of the merits, viz., whether, if petitioner is right in contending that his contract of enlistment was breached, habeas corpus is the appropriate remedy.

Affirmed.

(3) Military Service--Reservists.

STRAIT v. LAIRD
406 U.S. 341 (1972)

Petitioner is an Army Reserve officer not on active duty. His active duty obligations were deferred while he went to law school after graduating from college. During the period of deferment and at the time this action was commenced, his military records were kept at Fort Benjamin Harrison, Indiana. His nominal commanding officer was the Commanding Officer of the Reserve Officer Components Personnel Center at Fort Benjamin Harrison. Petitioner was, however, at all times domiciled in California and was never in Indiana or assigned there. On finishing law school he took the California Bar examination and on March 5, 1970, he was ordered to report for active duty at Fort Gordon, Georgia, beginning April 13, 1970. Before that time, however, he had filed an application for discharge as a conscientious objector. That application was processed at Fort Ord, California, where hearings were held. Fort Ord recommended his discharge and review of that recommendation was had in Indiana. The result was disapproval of the application.

Petitioner thereupon filed a petition for writ of habeas corpus in California. The District Court denied a motion to dismiss, holding that it had jurisdiction . . . , but ruled against petitioner on the merits. On appeal the Court of Appeals agreed with the District Court as to jurisdiction but disagreed with it on the merits and granted the writ. Shortly thereafter our decision in Schlanger v. Seamans, 401 U.S. 487, 28 L. Ed. 2d 251, 91 S. Ct. 995, was announced. Thereupon the Court of Appeals granted a

petition for rehearing and dismissed the action, holding that the District Court had no jurisdiction under the habeas corpus statutes. 445 F.2d 843. The case is here on a petition for certiorari, which we granted. We reverse the judgment below.

In Schlanger the serviceman--on active duty in the Air Force--was studying in Arizona on assignment from Ohio. There was no officer in Arizona who was his custodian or one in his chain of command, or one to whom he was to report. While the Habeas Corpus Act extends to those "in custody under or by color of the authority of the United States," 28 USC § 2241(c)(1), we held in Schlanger that the presence of the "custodian" within the territorial jurisdiction of the District Court was a sine qua non. In Schlanger the only "custodian" of the serviceman was in Moody AFB, Georgia. While there were Army officers in Arizona, there were none to whom the serviceman was reporting and none who were supervising his work there, though he was on active duty. Moreover, the serviceman in that case was in Arizona only temporarily for an educational project.

In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where his application for conscientious objector discharge was processed and where hearings were held. It was in California where he had had his only meaningful contact with the Army; and his superiors there recommended his discharge as a conscientious objector.

Thus, the contention in the dissent that we "abandon Schlanger" by the approach we took today is incorrect. Sergeant Schlanger was on permissive temporary duty. While his stay in Arizona was thus not charged to his leave time, it was primarily for his own benefit, he paid his own expenses, and he was as much on his own as any serviceman on leave. We held in Schlanger that, while an active-duty serviceman in such a status might be in military "custody," see Donigan v. Laird, 308 F. Supp. 449 (Md. 1969), his custodian may not be deemed present wherever the serviceman has persuaded the service to let him go. The jurisdictional defect in Schlanger, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district.

Strait's situation is far different. His nominal custodian, unlike Schlanger's, has enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait. Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military had taken place in California. In the face of this record, to say that Strait's custodian is amenable to process only in Indiana--or

wherever the Army chooses to locate its record keeping center, would be to exalt fiction over reality.

In a closely parallel case the Court of Appeals for the Second Circuit held that an unattached reserve officer who lived in New York and whose application for discharge as a conscientious objector was processed in New York could properly file for habeas corpus in New York, even though the commanding officer of the reservists was in Fort Benjamin Harrison, Indiana. Arlen v. Laird, 451 F.2d 684. The court held that the only contacts the serviceman had had with his commanding officer were through the officers he dealt with in New York. Those contacts, it concluded, were sufficient to give the commanding officer "presence" in New York. It concluded:

"Quite unlike a commanding officer who is responsible for the day to day control of his subordinates, the commanding officer of the Center is the head of a basically administrative organization that merely keeps the records of unattached reservists. To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only within one small geographical area is to ignore reality." Id. at 687.

We agree with that view. Strait's commanding officer is "present" in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge. To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience. It "would result in a concentration of similar cases in the district in which the Reserve Officer Components Personnel Center is located." Donigian v. Laird, 308 F. Supp. at 453. The concepts of "custody" and "custodian" are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.

We intimate no opinion on the merits of the controversy--whether petitioner is entitled to a discharge or whether by denying that relief the Army has acted in accordance with the prescribed procedures. We hold only that there is jurisdiction under 28 U.S.C. § 2241(c)(1) for consideration of this habeas corpus petition and for decision on the merits.

Reversed.

A servicemember overseas has access to the writ of habeas corpus in the United States District Court for the District of Columbia.¹¹⁰ Moreover, jurisdiction attaches on the initial filing of a habeas corpus petition; it is not lost by a transfer of the petitioner and the accompanying custodial change,¹¹¹ or by an unconditional release of the petitioner.¹¹²

e. Injunctions.

(1) General. An injunction has been defined as "a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it deems contrary to equity and good conscience."¹¹³ This equitable remedy is frequently sought in cases involving the military, and it is potentially the most disruptive form of relief a court can render. An injunction can literally "stop the military in its tracks."¹¹⁴ Injunctive relief can come in three forms: a temporary restraining order (TRO), a preliminary injunction, and a permanent injunction. The permanent injunction is issued only after a plaintiff's claim is heard on its merits. TROs and preliminary injunctions, on the other hand, are issued during the pendency of an action. These latter forms of relief are the subjects of this section.

(2) Federal Rules of Civil Procedure, Rule 65. TRO's and preliminary injunctions are governed by Rule 65 of the Federal Rules of Civil Procedure.

¹¹⁰Ex parte Hayes, 414 U.S. 1327 (1973); *Centa v. Stone*, 755 F. Supp. 197 (N.D. Ohio 1991).

¹¹¹See, e.g., *Santillanes v. United States Parole Comm'n*, 754 F.2d 887, 888 (10th Cir. 1985).

¹¹²*Carafas v. LaVallee*, 391 U.S. 234 (1968).

¹¹³43 C.J.S. Injunctions § 2 (1978).

¹¹⁴See generally Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978).

(3) Temporary Restraining Orders (TROs).

(a) General. "A restraining order is a temporary order entered in an action, without notice, if necessary, . . . upon a showing of its necessity in order to prevent immediate and irreparable injury" until the court can consider the plaintiff's motion for a preliminary injunction.¹¹⁵ The plaintiff usually seeks a TRO at the commencement of a lawsuit to preserve "a state of affairs in which the court can provide effective relief."¹¹⁶

(b) Procedure.

(i) Notice. Temporary restraining orders can be granted with or without notice.¹¹⁷ Of course, some notice is better than no notice at all.¹¹⁸ Where notice and a hearing are provided, the district court may be able to treat a TRO motion as one for a preliminary injunction, and if warranted, grant preliminary injunctive relief.¹¹⁹ If the TRO is sought without notice, the movant's attorney must certify in writing the efforts, if any, made to give notice and the reasons why the court should not require notice.¹²⁰ In geographic areas where United States attorneys or agency counsel are

¹¹⁵7 Moore's Federal Practice para. 65.05 (1984). See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70*, 415 U.S. 423, 439 (1974); *Pan American World Airways, Inc. v. Flight Eng'rs' Internat'l Ass'n*, 306 F.2d 840, 842-43 (2d Cir. 1962).

¹¹⁶Developments in the Law--Injunctions, 78 Harv. L. Rev. 994, 1060 (1965).

¹¹⁷Fed. R. Civ. P. 65(b).

¹¹⁸Granny Goose, 415 U.S. at 438-39.

¹¹⁹*Levas and Levas v. Village of Antioch*, 684 F.2d 446, 448 (7th Cir. 1982).

¹²⁰Fed. R. Civ. P. 65(b)(2).

readily available, this may be a difficult burden to meet.¹²¹ A movant's failure to furnish the necessary certification should result in the denial of temporary relief.¹²² If the district court grants a TRO without notice, it must state in its order the reasons why it did not require notice.¹²³

(ii) Term of Order. A TRO issued without notice expires by its own terms, not to exceed 10 days.¹²⁴ The court may extend the order for good cause for an additional 10 days.¹²⁵ Further extension of the order could "ripen" the TRO into a preliminary injunction and enable the nonmoving party to bring an interlocutory appeal under 28 U.S.C. § 1292(a)(1).¹²⁶

(iii) Bond. Rule 65(c) requires the posting of security before the issuance of a TRO or a preliminary injunction. The security will cover costs and damages that the nonmoving party might suffer as a consequence of the restraining order or the injunction. Some courts have held that a TRO or a preliminary injunction may not be entered without bond.¹²⁷ In practice,

¹²¹See, e.g., *Ziegman Productions, Inc. v. Milwaukee*, 496 F. Supp. 965 (E.D. Wis. 1980) (burden not met in suit against city which had 25 attorneys available to receive notice).

¹²²See, e.g., *Thompson v. Ramirez*, 597 F. Supp. 726 (D.P.R. 1984). See generally 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2952 (1973) [hereinafter 11 Wright & Miller].

¹²³Fed. R. Civ. P. 65(b). But cf. *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 870 (D. Nev. 1987) (district court's failure to include explanation for grant of ex parte TRO does not vitiate order).

¹²⁴Fed. R. Civ. P. 65(b).

¹²⁵Id.

¹²⁶See infra § 4.3e(4)(b)(iii).

¹²⁷E.g., *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F.2d 257, 273-74 (9th Cir. 1964), cert. denied, 380 U.S. 956 (1965); *Doe v. Mathews*, 420 F. Supp. 865, 873-74 (D.N.J. 1976).

however, courts often forego the bond requirement in suits against the government. When the United States or one of its officers or agencies is seeking interlocutory relief, no bond is required.¹²⁸

(iv) Appeal. As a general rule, orders granting, denying, or dissolving a TRO are not appealable as an interlocutory order under 28 U.S.C. § 1292(a).¹²⁹ Appellate review is generally not available through mandamus.¹³⁰ Two reasons justify the nonappealability of district court decisions on TROs:

Under Rule 65(b), F.R. Civ. P., such an order expires not later than twenty days after issuance during which time an appeal is not normally feasible; and the trial judge has not normally had the advantage of a hearing on the facts and the applicable law. Orderly procedure requires that the trial judge be permitted to pass on the question before his decision is reviewed by a higher court.¹³¹

Circumstances arise, however, under which parties may appeal orders pertaining to temporary relief. For example, the nonmoving party may appeal a TRO extended, without consent, substantially beyond the time limits of Rule 65(b).¹³² In this regard, the label attached by the district court to the order is not

¹²⁸Fed. R. Civ. P. 65(c).

¹²⁹In re Lieb, 915 F.2d 180, 183 (5th Cir. 1990); Catholic Social Serv., Inc. v. Meese, 813 F.2d 1500, 1503 (9th Cir. 1987); Fernandez-Roque v. Smith, 671 F.2d 426, 429 (11th Cir. 1982); Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2d Cir. 1974); Drudge v. McKernon, 482 F.2d 1375, 1376 (4th Cir. 1973); Maine v. Fri, 483 F.2d 439, 440-41 (1st Cir. 1973); Leslie v. Penn Central R.R. Co., 410 F.2d 750, 751 (6th Cir. 1969).

¹³⁰Pennsylvania R.R. Co. v. Transportation Workers Union of America, 278 F.2d 693, 694 (3d Cir. 1960).

¹³¹Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965). See Connell v. Dulien Steel Products, Inc., 240 F.2d 414, 418 (5th Cir. 1957), cert. denied, 356 U.S. 968 (1958).

¹³²International Primate Protection League v. Administrators of Tulane Educ. Fd., 500 U.S. 72 (1991); Chatman v. Spillers, 44 F.3d 923 (11th Cir. 1995).

decisive.¹³³ An appellate court may also entertain an appeal from an order granting or denying temporary relief when the court issued the order following notice and a hearing. In such cases, the orders are treated as denying or granting preliminary injunctive relief.¹³⁴ Finally, where the grant or denial of a TRO would effectively moot the case, the order may be appealable.¹³⁵

(c) Burden of Proof. The party applying for a TRO has the burden of convincing the court that the motion should be granted.¹³⁶ The most important prerequisite to temporary relief is a demonstration of irreparable injury--that is, harm that cannot be rectified by a later judgment in favor of the movant.¹³⁷ The concept of irreparable injury is discussed in greater detail below.¹³⁸ In

¹³³E.g., *Fernandez-Roque v. Smith*, 671 F.2d 426, 429-30 (11th Cir. 1982); *Morning Telegraph v. Powers*, 450 F.2d 97, 99 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972); 7 Moore's, para. 65.07 (1984).

¹³⁴See, e.g., *Environmental Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980); *Levesque v. State of Maine*, 587 F.2d 78, 79-80 (1st Cir. 1978); *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir. 1978); *Morning Telegraph v. Powers*, 450 F.2d 97, 99 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

¹³⁵See, e.g., *Romer v. Green Point Savings Bank*, 27 F.3d 12 (2d Cir. 1994) (TRO had effect of final permanent injunction); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 57 (D.C. Cir. 1977) (denial of motion for TRO to acquire impounded funds immediately before the end of fiscal year); *United States v. Washington Post Co.*, 446 F.2d 1322 (D.C. Cir. 1971) (denial of TRO to prohibit publication of "Pentagon Papers").

¹³⁶*Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969); *Minneapolis Urban League, Inc. v. City of Minneapolis*, 650 F. Supp. 303, 305 (D. Minn. 1986); *Thompson v. Ramirez*, 597 F. Supp. 726 (D.P.R. 1984); *Ragold, Inc. v. Ferrero, U.S.A., Inc.*, 506 F. Supp. 117, 123 (N.D. Ill. 1980).

¹³⁷Fed. R. Civ. P. 65(b)(1). See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70*, 415 U.S. 423, 438-39 (1974); 11 *Wright & Miller*, supra note 122, § 2951.

¹³⁸See infra § 4.3e(4)(c)(iii).

addition to irreparable harm, the court will also consider the likelihood that the movant will succeed on the merits of the case, the harm to the nonmoving party from the TRO, and the public interest.¹³⁹

(4) Preliminary Injunctions.

(a) General. The most troublesome form of injunctive relief is the preliminary injunction. Its purpose is to preserve the status quo during the pendency of a lawsuit.¹⁴⁰ Because litigation can proceed for years before being resolved, the preliminary injunction can "tie the hands" of the military for a long period of time before a court ever fully considers the merits of its defense to the action. An injunction should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff.¹⁴¹

(b) Procedure.

(i) Notice and Hearing. Unlike a TRO, a court may not issue a preliminary injunction without notice to the adverse party.¹⁴² The term "'notice' implies a hearing."¹⁴³

¹³⁹*Minneapolis Urban League, Inc. v. City of Minneapolis*, 650 F. Supp. 303, 305 (D. Minn. 1986).

¹⁴⁰See, e.g., *Amoco Oil Company v. Rainbow Snow, Inc.*, 809 F.2d 656 (10th Cir. 1987).

¹⁴¹*Meinhold v. Department of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1993) (reversing a DOD-wide injunction on the discharge of servicemembers based on sexual orientation); *Ausable Manistee Action Council, Inc. v. Stump*, 883 F. Supp. 1112 (D. Mich. 1995) (refusing to enjoin the National Guard Bureau from constructing a gunnery range).

¹⁴²Fed. R. Civ. P. 65(a)(1). See, e.g., *Sims v. Greene*, 161 F.2d 87, 88-89 (3d Cir. 1947); *Inland Empire Enterprises, Inc. v. Morton*, 365 F. Supp. 1014, 1018 (C.D. Calif. 1973).

¹⁴³7 Moore's, supra note 115, para. 65.04[3] (1984). See *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir. 1978); *Consolidated Coal Co. v. Disabled Miners of S.W. Va.*, 442 F.2d 1261, 1269 (4th Cir.), cert. denied, 404 U.S. 911 (1971); *Sims v. Greene*, 161 F.2d 87, 88-89 (3d Cir. 1947).

While a court may decide a motion for a preliminary injunction on the basis of affidavits alone,¹⁴⁴ an evidentiary hearing is required where there are disputed issues of fact.¹⁴⁵ A district court may consolidate the trial on the merits of a lawsuit with the hearing on the application for a preliminary injunction, provided it gives notice to the parties that it is doing so.¹⁴⁶ A district court's order of consolidation will not be overturned on appeal "absent a showing of substantial prejudice in the sense that a party was not allowed to present material evidence."¹⁴⁷

(ii) Security. Although courts should not issue preliminary injunctions without a bond,¹⁴⁸ courts often ignore this requirement in suits against the government.

(iii) Appeal. Orders granting, continuing, modifying, refusing, or dissolving preliminary injunctions are appealable.¹⁴⁹ The standard used in reviewing a grant or denial of

¹⁴⁴San Francisco-Oakland Newspaper Guild v. Kennedy ex rel. N.L.R.B. 412 F.2d 541 (9th Cir. 1969).

¹⁴⁵Fingler v. Numismatic Americana, Inc., 832 F.2d 745 (2d Cir. 1987); Aguirre v. Chula Vista Sanitary Serv., 542 F.2d 779, 781 (9th Cir. 1976); Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972); Carter-Wallace, Inc. v. Davis-Edward Pharmacal Corp., 443 F.2d 867, 872 n.5 (2d Cir. 1971). But cf. International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986) (where evidentiary hearing impractical because of magnitude of inquiry, it is not required).

¹⁴⁶Fed. R. Civ. P. 65(a)(2); Gellman v. Maryland, 538 F.2d 603 (4th Cir. 1976); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 936 (10th Cir. 1975). Cf. Berry v. Bean, 796 F.2d 713, 719 (4th Cir. 1986) (consolidation of appeal from grant of preliminary injunction and the merits).

¹⁴⁷Abraham Zion Corp. v. Lebow, 761 F.2d 93, 101 (2d Cir. 1985).

¹⁴⁸Fed. R. Civ. P. 65(c).

¹⁴⁹28 U.S.C. § 1292(a)(1) (1982); Carson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981). See Centurion Reinsurance, Co. v. Singer, 810 F.2d 140, 143 (7th Cir. 1987); Sims Varner & Assoc., Inc. v. Blanchard, 794 F.2d 1123, 1126-27 (6th Cir. 1986); Gjertsen v. Board of Election Comm'rs, 751 F.2d 199, 201 (7th Cir. 1984); Professional Plan Examiners of New Jersey, Inc. v. Lefante, 750

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a preliminary injunction is whether the district court's decision constituted an "abuse of discretion."¹⁵⁰ The standard is a deferential one. The court of appeals may not simply substitute its judgment for that of the district court: "The question for [the appellate court] is whether the [district] judge exceeded the bounds of permissible choice in the circumstances, not what [the appellate court] would have done if [it] had been in his shoes."¹⁵¹ Although the scope of appellate review is normally a narrow one, because the Supreme Court grants considerable leeway in deciding whether restrictions on free speech are justified,¹⁵² by analogy the same leeway may be afforded to review grant or denial of preliminary injunctive relief based on alleged infringements of free speech.¹⁵³

(c) Elements and Burden of Proof.

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F.2d 282, 287 (3d Cir. 1984); *Overton v. City of Austin*, 748 F.2d 941, 949 (5th Cir. 1984); *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982).

¹⁵⁰*Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987); *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *Hale v. Department of Energy*, 806 F.2d 910, 914 (9th Cir. 1986); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34, 36 (1st Cir. 1986); *Anthony v. Texaco, Inc.*, 803 F.2d 593, 599 (10th Cir. 1986); *Abbott Labs. v. Meade Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992); *Britt v. United States Army Corps of Eng'rs*, 769 F.2d 84, 88 (2d Cir. 1985); *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985); *Mississippi Power & Light Co. v. United Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985).

¹⁵¹*Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 390 (7th Cir. 1984). See *American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 595 (7th Cir. 1985) ("To reverse an order granting or denying a preliminary injunction . . . it is not enough that we think we would have acted differently in the district judge's shoes; we must have a strong conviction that he exceeded the permissible bounds of judgment").

¹⁵²See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) ("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record").

¹⁵³*Lindsay v. City of San Antonio*, 821 F.2d 1103, 1108 (5th Cir. 1987).

(i) General. A preliminary injunction is an extraordinary remedy.¹⁵⁴

The movant bears the burden of proving an entitlement to preliminary relief.¹⁵⁵ As a general rule, a movant must establish four elements: (1) that there is a substantial likelihood that the movant will succeed on the merits of his claim; (2) that the movant will suffer irreparable injury if preliminary relief is not granted; (3) that the injury movant will suffer outweighs the harm to the adverse party if injunctive relief is granted; and (4) that the public interest will not be harmed by the issuance of a preliminary injunction.¹⁵⁶ An injunction will not issue when the relief sought is moot.¹⁵⁷

(ii) Likelihood of Success. A movant for preliminary relief generally must demonstrate that there is a reasonable possibility of success on the claim.¹⁵⁸ Although the movant need not show he is certain to win the case, he must at least present a prima facie case.¹⁵⁹ In

¹⁵⁴See, e.g., Zardui-Quintana, 768 F.2d at 121; Mississippi Power, 760 F.2d at 621.

¹⁵⁵Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70, 415 U.S. 423, 442-43 (1974); Triebwasser and Katz v. American Telephone and Telegraph Co., 535 F.2d 1356, 1358 (2d Cir. 1976); Pride v. Community School Bd., 482 F.2d 257 (2d Cir. 1973).

¹⁵⁶Walmer v. Department of Defense, 52 F.3d 851 (10th Cir.), cert. denied, 116 S. Ct. 474 (1995) (affirming district court's refusal to enjoin the discharge of an officer who admitted having engaged in homosexual acts); Able v. Perry, 44 F.3d 128 (2d Cir. 1995) (preliminary injunction prohibiting the investigation or the initiation of discharge proceedings based on self-identification as a gay or lesbian remanded with instructions to combine the preliminary injunction hearing with the trial on the merits applying a more rigorous likelihood of success standard); Meinhold v. Department of Defense, 34 F.3d 1469 (9th Cir. 1994).

¹⁵⁷See, e.g., Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (plaintiffs' application to enjoin DOD from using a press pool and denying correspondents' access to the Gulf War theater of operations was denied as the conclusion of the war rendered the issue moot).

¹⁵⁸Able v. Perry, 44 F.3d 128 (2d Cir. 1995).

¹⁵⁹See Curtis v. Thompson, 840 F.2d 1291, 1297 (7th Cir. 1988) (the plaintiff must at least demonstrate a negligible chance of success on the merits to obtain injunctive relief, if not the court need

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most cases, this element is balanced against the other elements for preliminary relief, especially the nature of the irreparable injury.¹⁶⁰

(iii) Irreparable Injury. Of all the prerequisites of preliminary relief, the requirement that a movant show irreparable injury is the most important.¹⁶¹ "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."¹⁶² Irreparable injury is harm that cannot be rectified by a later final judgment in favor of a movant on the merits of the case.¹⁶³ A mere loss of money or income, or termination of employment or service, or harm to reputation caused by such a separation does not constitute irreparable harm. All of these injuries can be cured by a final judgment that awards money or back pay, reinstatement, and a

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not consider the remaining factors); *Giron v. Acevedo-Ruiz*, 834 F.2d 238, 240 (1st Cir. 1987); *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) ("It is enough that the plaintiff's chances are better than negligible"); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 502 (9th Cir. 1980); *Benda v. Grand Lodge of Internat'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979).

¹⁶⁰*Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387-88 (7th Cir. 1984).

¹⁶¹See Leubsdorf, supra note 114, at 544-45.

¹⁶²*Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959). See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Arcamuze v. Continental Air Lines, Inc.*, 819 F.2d 935 (9th Cir. 1987); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Interco, Inc. v. First Nat'l Bank*, 560 F.2d 480 (1st Cir. 1977). But see *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 175 (9th Cir. 1987) (where an injunction is authorized by statute and where the statutory conditions are met, irreparable harm is assumed and need not be independently established).

¹⁶³*ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987); *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34, 36 (1st Cir. 1986); Roland Machinery, 749 F.2d at 386.

correction of records.¹⁶⁴ Hartikka v. United States illustrates the role of irreparable injury in the quest for a preliminary injunction.

HARTIKKA v. UNITED STATES
754 F.2d 1516 (9th Cir. 1985)

Before SNEED, ANDERSON and FERGUSON, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The Air Force appeals the district court's issuance of a preliminary injunction. It contends that the district judge based his ruling on the application of an erroneous legal standard. Specifically, appellants argue that the standard enunciated in Sampson v. Murray, 415 U.S. 61, 94 S. Ct. 937, 39 L.Ed.2d 166 (1974), governs cases where military personnel seek preliminary injunctive relief prohibiting a discharge. We agree and hold that the district court's judgment must be reversed and its order vacated.

BACKGROUND

The appellee Dale M. Hartikka, is a captain in the United States Air Force. With the exception of a three-year period in which he served in the Air Force Reserve, Hartikka has continuously served as a pilot with the Air Force since entering active duty as a commissioned officer on January 3, 1978.

On March 8, 1983, an Air Force Board of Inquiry was convened to consider certain charges of drunk and disorderly conduct against Hartikka. Following a hearing on the charges, Hartikka was found, on two occasions, too intoxicated to perform his duties and, on a third occasion, he was found to have wrongfully discharged a semi-automatic weapon in the direction of a neighbor's house while highly intoxicated. The Board recommended that Hartikka be discharged for committing these acts. The Secretary of the Air Force followed this recommendation and approved a discharge "under honorable conditions (general)." Such a discharge is "[a]ppropriate when a member's military record is not sufficiently meritorious to warrant an honorable characterization." 32 C.F.R. § 41.9(a)(2).

¹⁶⁴Sampson v. Murray, 415 U.S. 61 (1974). See Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

Hartikka immediately applied for administrative review of the Secretary's decision with the Air Force Board for Correction of Military Records. He also filed a complaint in United States District Court seeking injunctive and declaratory relief, alleging certain procedural irregularities in the processing of his discharge.

The district court granted Hartikka's motion for preliminary injunction, finding that he had "demonstrated that he has a fair chance on the merits of his claim" and that "[t]he balance of hardships tips sharply in [Hartikka's] favor." E.R. at 4-5 (emphasis added).

On appeal, the sole issue is whether the district court erred in issuing the preliminary injunction, thereby prohibiting the Air Force from discharging appellee, pending administrative review of Hartikka's discharge.

DISCUSSION

The grant of a preliminary injunction will be reversed where the district court has abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

The crucial inquiry in this matter concerns the appropriate standard for granting injunctive relief. "The critical element in determining the test to be applied is the relative hardship to the parties." Id. (citing Benda v. Grand Lodge of the International Association of Machinists), 584 F.2d 308, 315 (9th Cir. 1978), cert. denied, 441 U.S. 937, 99 S. Ct. 2065, 60 L.Ed.2d 667 (1979)). The usual standard, applied by the district court, requires that the moving party show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. See, e.g., William Inglis & Sons Baking Co. v. I.T.T. Continental Banking Co., Inc., 526 F.2d 86, 88 (9th Cir. 1975).

Application of the standard enunciated by the Supreme Court in Sampson would, however, require that the moving party make a much stronger showing of irreparable harm than the ordinary standard for injunctive relief. 415 U.S. at 84, 91-92 n. 68, 94 S. Ct. at 950, 953-954 n. 68. That is, where the balance of harm tips less decidedly toward a plaintiff, he must make a greater showing of a likelihood of success on the merits than where the balance tips decidedly in his favor. Benda v. Grand Lodge, supra, 584 F.2d at 315. The necessity of making this stronger showing is implicit in the magnitude of the interests weighing against judicial interference in the internal affairs of the armed forces. See, e.g., Sampson, 415 U.S. at 83-84, 94 S. Ct.

at 949-950, and Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S. Ct. 534, 539-540, 97 L.Ed. 842 (1953). While we realize that the rule in Sampson concerned the rights of civilian employees, we agree that it should also be applied to military personnel. See Chilcott v. Orr, 747 F.2d 29, 32-34 (1st Cir. 1984). See also Peeples v. Brown, 444 U.S. 1303, 1305, 100 S. Ct. 381, 383, 62 L.Ed.2d 300 (1979). Consequently, we conclude that the district court erred in application of the traditional standard for injunctive relief.

We next examine whether Hartikka has demonstrated sufficient irreparable injury to satisfy the test. Although the Sampson court did not specify what type of irreparable injury would satisfy its higher standard, it indicated that the circumstances must be "genuinely extraordinary;" that is, they must be a "far depart[ure] from the normal situation" of employment discharge. Sampson, *supra*, 415 U.S., at 91-92 and n. 68, 94 S. Ct. at 953-954 and n. 68.

Hartikka's claims of irreparable injury are based on assertions of loss of income, loss of retirement and relocation pay, and damage to his reputation resulting from the stigma attaching to a less than honorable discharge. ER at 84-85. Our review leads us to conclude that these alleged injuries are insufficient under the Sampson standard to justify injunctive relief. The loss of income, the ensuing collateral effects thereof, and the possibility of stigma are "external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself [and] will not support a finding of irreparable injury, however severely they may affect a particular individual." Sampson, 415 U.S. at 92 n. 68, 94 S. Ct. at 953 n. 68.

CONCLUSION

For the foregoing reasons, the judgment of the district court, granting preliminary injunctive relief, is

Reversed and its order

VACATED.¹⁶⁵

¹⁶⁵See Sebra v. Neville, 801 F.2d 1135, 1139 (9th Cir. 1986); Stewart v. United States Immigration & Naturalization Serv., 762 F.2d 193, 199 (2d Cir. 1985); Harris v. United States, 745 F.2d 535 (8th Cir. 1984); Moteles v. University of Penn., 730 F.2d 913 (3d Cir. 1984), *cert. denied*, 469 U.S. 855 (1985); Levesque v. State of Maine, 587 F.2d 78 (1st Cir. 1978); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978); Simmons v. Brown, 497 F. Supp. 173 (D. Md. 1980); Jamison v. Stetson, 471 F. Supp. 48 (N.D.N.Y. 1978). *Cf.* Martin v. Stone, 759 F. Supp. 19, 21 (D.D.C. 1991) (fact that

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While injury that courts can rectify through the payment of money damages is not irreparable, courts may grant preliminary relief to preserve a damages remedy. In other words, if a plaintiff will not be able to collect a judgment because of the events he or she seeks to enjoin, injunctive relief may be warranted.¹⁶⁶ For example, a court may grant a preliminary injunction to prevent a defendant from dissipating assets to become judgment proof.¹⁶⁷

Although discharge from military service or government employment usually does not constitute irreparable harm, involuntary military service is per se irreparable. It is harm that cannot be rectified by a later money judgment.¹⁶⁸

Finally, a number of courts have held that a violation of a movant's constitutional rights is irreparable injury per se.¹⁶⁹

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separated cadet is falling behind peers at service academy does not present the kind of irreparable harm that warrants premature judicial review of military personnel actions). But cf. Tully v. Orr, 608 F. Supp. 1222, 1225-26 (E.D.N.Y. 1985) (adverse effects of disenrollment from service academy constitute irreparable harm).

¹⁶⁶Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986); Anthony v. Texaco, Inc., 803 F.2d 593 (10th Cir. 1986); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986).

¹⁶⁷Teradyne, 797 F.2d at 43.

¹⁶⁸Patton v. Dole, 806 F.2d 24 (2d Cir. 1986).

¹⁶⁹See Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion); American Postal Workers Union v. United States Postal Serv., 766 F.2d 715, 721 (2d Cir. 1985), cert. denied, 475 U.S. 1046 (1986); Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977); Covino v. Patrissi, 967 F.2d 731 (2d Cir. 1992); Gay Veterans Ass'n, Inc. v. American Legion, 621 F. Supp. 1510, 1515 (S.D.N.Y. 1985).

(iv) Balance of Injuries and the Public Interest. A movant for preliminary relief must show that the injury he will suffer if injunctive relief is not granted outweighs the harm the nonmoving party will suffer if relief is granted, and that the public interest will be served (or at least not be jeopardized) by a preliminary injunction.¹⁷⁰ In cases involving the military, courts often combine these two elements and equate harm to the military from preliminary relief with harm to the public interest.¹⁷¹ Pauls v. Secretary of the Air Force illustrates such harm.

PAULS v. SECRETARY OF THE AIR FORCE
457 F.2d 294 (1st Cir. 1972)

The Secretary of the Air Force and named Air Force officer defendants have taken this timely appeal from judgment entered by the District Court, filed December 31, 1970, adjudging the plaintiffs in these consolidated cases, Captain Pauls and Captain Criscuolo, be retained in active duty in the United States Air Force pending final disposition of this litigation; that the case be remanded to the Air Force Board for the Correction of Military Records; that disclosure be made of pertinent statistical data requested by plaintiffs to the extent that it is unclassified; and that the Board make detailed findings of fact. The court retained jurisdiction "for review of final determination by the Secretary of the Air Force of plaintiffs' administrative petitions."

Since, as will hereinafter appear, we dispose of this appeal on jurisdictional grounds, a detailed statement of the voluminous factual matter disclosed by the record is not required. Pauls and Criscuolo were captains in the Air Force stationed in Puerto Rico. Pauls was initially scheduled to be released from duty on June 30, 1967, and

¹⁷⁰See 11 Wright & Miller, supra note 122, § 2948; American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593-94 (7th Cir. 1986); see also Chalk v. United States Dist. Court Cent. Dist. of Col., 840 F.2d 701 (9th Cir. 1988) (parents' and students' fear of AIDS was not sufficient to outweigh the harm suffered by a teacher with AIDS who was removed from the classroom). Pruner v. Department of the Army, 755 F. Supp. 362, 364 (D. Kan. 1991) (injunctive relief pending military's processing of conscientious objector application "would seriously interfere with the public interest in the efficient deployment of troops in connection with Operation Desert Shield.").

¹⁷¹See, e.g., Schneble v. United States, 614 F. Supp. 78, 84 (S.D. Ohio 1985); Simmons v. Brown, 497 F. Supp. 173 (D. Md. 1980); Jamison v. Stetson, 471 F. Supp. 48 (N.D.N.Y. 1978); but see Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992) (the government may not assume that the public interest lies solely with it).

Criscuolo on June 30, 1968, in accordance with Air Force Regulation 36-12 since they had been considered and passed over for promotion to major on at least two occasions. Due to the needs in Southeast Asia, both officers were retained in the Air Force at the pleasure of the Secretary. During the period of extension both officers were again considered for promotion and passed over.

In 1969 the Secretary of Defense announced the implementation of Project 703 under which passed-over officers such as plaintiffs who had not served eighteen years were to be separated from service on March 31, 1970. At the request of each of the plaintiffs, the Air Force extended their service to June 30, 1970. Six hundred officers have been released under Project 703. On the critical date for determining length of service, Criscuolo had active duty of fourteen years and five months and Pauls of seventeen years and eight months.

These actions were commenced on June 26, 1970. An order was entered in each case on June 29, 1970, restraining the release of each plaintiff from the Air Force. Hearing was set on plaintiffs' motion for temporary injunction of July 6. The hearing was continued. The temporary restraining order was extended by stipulation. Defendants have filed motion to vacate the temporary restraining order and have resisted the application for temporary injunction.

Defendants urge, among other grounds, that the court acquired no jurisdiction over the plaintiffs' action and thus had no authority to issue a restraining order or a temporary injunction. On August 13, 1970, a hearing was held on the application for a temporary injunction and defendants' motion to vacate the temporary restraining order. The order entered on December 31, 1970, heretofore referred to, in effect grants the temporary injunction.

Plaintiffs' basic contention is that their supervisory officers in making periodic Officer Effectiveness Reports (O.E.R.s) strictly followed the regulations relating to the rating system and gave plaintiffs ratings which under the regulations would put them in the top 15% of the officers eligible for promotion, while other reviewing officers in disregard of the regulations gave their personnel inflated ratings. The O.E.R. rating reports are placed in each officer's military records and are part of the record considered by officer promotion boards in determining which officers are entitled to promotion. The number of officers given promotion depends on the number of officers needed in each officer category and the quota of officers needed in the higher grades is generally considerably less than the available supply with the result that many loyal and capable officers cannot be promoted or retained in the service. Plaintiffs' contention is that the inflated ratings given other officers in violation of the regulations resulted in

placing the plaintiffs well below the top 15% of officers eligible to be considered for promotion.

Affidavits of many of the officers making plaintiffs' O.E.R.s were filed to support plaintiffs' contentions that they were capable officers entitled to promotion and that affiants' strict adherence to the regulations placed plaintiffs in an unfavorable position compared to some other officers who had received inflated ratings from other rating officers.

After exhausting available administrative procedures within the service to correct their records, plaintiffs sought correction of their records by the Air Force Board for the Correction of Military Records pursuant to 10 U.S.C.A. § 1552. The Board afforded plaintiffs a full evidentiary hearing and denied relief. The suits now before us followed.

The relief sought is to enjoin defendants (1) from releasing plaintiffs from active service, (2) from refusing to correct plaintiffs' military records to show that they had not been passed over for promotion, and (3) from refusing to delete certain unfair O.E.R.s from their military records.

Defendants' present appeal is from the District Court's order of December 31, 1970, enjoining plaintiffs' release from active service during the pendency of this litigation and remanding the case to the Board directing discovery and detailed findings of fact. The defendants upon appeal present the following questions for review:

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4. Whether the district court had any basis upon which it could properly enjoin plaintiffs' release from active duty.

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As heretofore stated, the issue of the validity of the trial court's order granting temporary injunctive relief against the termination of plaintiffs' services is properly before us. A large discretion rests in the trial court in determining whether temporary injunctive relief is warranted.

"The standards which should guide the decision to grant a preliminary injunction have been often stated. The movant must show a substantial likelihood of success on the merits, and that irreparable harm would flow from the denial of an injunction. In addition, the trial court must consider the inconvenience that an injunction would cause

the opposing party, and must weigh the public interest as well." Quaker Action Group v. Hicke, 137 U.S.App.D.C. 176, 421 F.2d 1111, 1116.

Plaintiffs have failed to show any substantial likelihood of ultimate success in this litigation. Plaintiff's evidence in support of their correction of O.E.R.s is principally based upon a contention that they have been discriminated against because their rating officers have strictly followed the regulations whereas other rating officers have given inflated ratings to officers similarly situated. The records reflect that the Air Force and the Promotion Board were aware of the lack of perfection in the rating system but were unable to devise a better one. The O.E.R. is only one of many factors considered by the Promotion Board. The discrimination, if any exists, could only be corrected by reviewing the multiple ratings given all officers eligible for promotion in the plaintiffs' class. This would be an almost impossible task which would consume a tremendous amount of time which could better be used for other purposes. There is no certainty that any revision in ratings that might be accomplished would result in plaintiffs' promotions. The cases heretofore cited holding promotions to be discretionary and not subject to court review clearly minimize any chance of the plaintiffs to ultimately succeed in their efforts to be promoted.

The detriment to the Air Force in retaining officers it desires to retire is at least as great as that of the officers retired. Services of officers chosen for retirement will likely be of little benefit to the Air Force and will hamper the promotion of officers the Air Force desires to promote and may well impair the efficiency of the Air Force. In the event plaintiffs should ultimately prevail in this litigation, they can be compensated by back pay and restoration of full seniority rights. The public interest will not be adversely affected by denying injunctive relief.

The injunctive relief has now been in effect for some twenty-one months. Considerable additional time will elapse before the issues presented by this litigation are finally adjusted. We hold that the court erred in continuing the restraining order and in granting temporary injunctive relief.

. . . .

. . . The order insofar as it keeps in force the temporary restraining order, and insofar as it grants temporary injunctive relief is reversed and vacated.

(v) Some courts balance the four elements for a preliminary injunction differently. Usually, as the harm to the movant increases, the standard for establishing likelihood of success on the merits of the case decreases. The following list contains variations of the balancing test adopted by some courts of appeals:

(A) D.C. Circuit: "Under the well known standard set forth in this Circuit, four factors control the Court's discretion to grant a motion for a preliminary injunction: the likelihood that the plaintiff will prevail on the merits, the degree of irreparable injury that the plaintiff will suffer if the injunction is not issued, the harm to the defendant if the motion is granted, and the interest of the public. . . . In the event the last three factors favor the issuance of an injunction, a movant can satisfy the first factor by raising a serious question on the legal merits of the case."¹⁷²

(B) 1st Circuit: "We recognize that a finding attributing great weight to one of the four components might make up for a relatively weak finding as to another. If the chances of success are good, but not the highest, and the adverse effect on the public interest is very serious should the prognostication prove mistaken, the public interest might require that the injunction be denied."¹⁷³

(C) 2d Circuit: Where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the

¹⁷²Massachusetts Law Reform Inst. v. Legal Serv. Corp., 581 F. Supp. 1179, 1184 (D.D.C.), aff'd, 737 F.2d 1206 (D.C. Cir. 1984), citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

¹⁷³Mariane Giron v. Acevedo-Ruiz, 834 F.2d 238, 240 (1st Cir. 1987); cf. Lancor v. Lebanon Hous. Auth., 760 F.2d 361, 363 (1st Cir. 1985); Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 276 (1st Cir. 1981).

injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim. This exception reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.¹⁷⁴

(D) 4th Circuit: Four factors enter into the determination of whether a court should grant interim injunctive relief: (1) whether the plaintiff will suffer irreparable injury if interim relief is not granted; (2) the injury to the defendant if an injunction is issued; (3) the plaintiff's likelihood of success in the underlying dispute between the parties; and (4) the public interest.¹⁷⁵

(E) 5th Circuit: The four prerequisites for the relief of a preliminary injunction are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to plaintiff must outweigh the threatened harm the injunction may do to defendant; and (4) granting the preliminary injunction will not disserve the public interest.¹⁷⁶

(F) 6th Circuit: Where factors other than likelihood of success on the merits all are strongly in favor of a preliminary injunction, a court may issue an injunction if the merits present a sufficiently serious question to justify further investigation.¹⁷⁷

¹⁷⁴Able v. United States, 44 F.3d 128, 130 (2d Cir. 1995). See Britt v. United States Army Corps of Eng'rs, 769 F.2d 84, 88 (2d Cir. 1985).

¹⁷⁵Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

¹⁷⁶Wiggins v. Sec'y of Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991).

¹⁷⁷In re DeLorean Motor Co., 755 F.2d 1223, 1230 (6th Cir. 1985).

(G) 7th Circuit: " $P \times H_p (1-P) \times H_d$ " -- "A district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken. . . . [A preliminary injunction should be granted] only if the harm to the plaintiff [H_p] if the injunction is denied, multiplied by the probability [P] that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant [H_d] if the injunction is granted, multiplied by the probability that granting the injunction would be an error."¹⁷⁸

(H) 9th Circuit: "In this circuit, a preliminary injunction is properly granted if the moving party has demonstrated 'either a combination of probable success on the merits and a possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor.'"¹⁷⁹

(I) 10th Circuit: "Where the movant for a preliminary injunction prevails on the factors other than likelihood of success on the merits, it is ordinarily sufficient that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."¹⁸⁰

(d) Preliminary Injunctions and Bid Protests.

¹⁷⁸American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593 (7th Cir. 1986). See Schultz v. Frisby, 807 F.2d 1339, 1343 (7th Cir. 1986) (explains American Hosp. Supply algebraic formula); Brunswick Corp. v. Jones, 784 F.2d 271, 274 n.1 (7th Cir. 1986).

¹⁷⁹Beltram v. Meyers, 677 F.2d 1317, 1320 (9th Cir. 1982). See Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986).

¹⁸⁰City of Chanute v. Kansas Gas and Electric Co., 754 F.2d 310, 314 (10th Cir. 1985); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

(i) Introduction. One aspect of preliminary relief of particular interest to the military lawyer is its use in the context of bid protests. In these cases, an unsuccessful bidder for a government contract will attempt to enjoin the award or performance of the contested contract in the hope that it will ultimately be successful in acquiring the contract for itself. While the basic rules for preliminary relief apply to bid protest litigation, the forums for the litigation and the scope of the inquiry differ. This section will provide a brief overview of preliminary relief in bid protest litigation.¹⁸¹

(ii) Historical Development of the Remedy. The Supreme Court, in Perkins v. Lukens Steel,¹⁸² took a narrow view of standing in bid protest cases, holding that the statutes and regulations governing procurement were for the benefit of the government and not the contract bidders. Thus, bid protesters were without standing to challenge a contract awarded in contravention of the statutes and regulations under which the procurement was bid. The Perkins decision served as an effective bar to judicial review of bid protests for a number of years.¹⁸³

The first break from the confines of Perkins came in the Court of Claims. In Heyer Products Co. v. United States,¹⁸⁴ the court held that the government implicitly promises to honestly and fairly

¹⁸¹For a more detailed description of contract award litigation, see, e.g., J. Cibinic & R. Nash, Formation of Government Contracts 1005-46 (2d ed. 1986) [hereinafter J. Cibinic & R. Nash]; Simmons & Dzialo, Choosing the Best Forum for Protesting a Federal Contract Award, 31 Prac. Law. 29 (1985); Comment, Injunctive Relief in the United States Claims Court; Does a Bid Protester Have Standing?, 1985 B.Y.U. L. Rev. 803 [hereinafter Comment, Does a Bid Protester Have Standing?]; Comment, Equitable Relief Over Government Contract Claims Brought Before the Contract Is Awarded, 56 U. Colo. L. Rev. 655 (1985) [hereinafter Comment, Equitable Relief Over Government Contract Claims].

¹⁸²310 U.S. 113 (1940).

¹⁸³See Comment, Does a Bid Protester Have Standing?, supra note 181, at 805. The only forum available to consider contract award controversies was the General Accounting Office. J. Cibinic & R. Nash, supra note 181, at 1006.

¹⁸⁴140 F. Supp. 409 (Ct. Cl. 1956).

consider all bids for contracts. And if the bid is not evaluated in good faith, the government breaches its implied promise and is liable for damages measured by the plaintiff's bid preparation costs.¹⁸⁵

The seminal case of Scanwell Laboratories, Inc. v. Shaffer,¹⁸⁶ provided the basis for the federal courts to award equitable relief in bid protest cases. In Scanwell, the court held that disappointed bidders had standing to challenge the award of government contracts under the Administrative Procedure Act.¹⁸⁷ While the Supreme Court has never addressed the Scanwell holding, most of the other courts of appeals have followed the decision.¹⁸⁸

As part of the Federal Courts Improvement Act of 1982, Congress gave the Claims Court jurisdiction to render equitable relief in bid protest litigation.¹⁸⁹ Moreover, the Competition in Contracting Act of 1984¹⁹⁰ afforded the General Services Board of Contract Appeals (GSBCA) limited equitable jurisdiction over contract award controversies and included provisions for the automatic stay of contract awards pending General Accounting Office (GAO) resolution of bid protests.¹⁹¹

¹⁸⁵After Heyer, the court broadened the circumstances under which bid preparation costs were recoverable beyond simply those instances in which the government acts in bad faith. See, e.g., CACI, Inc.--Fed. v. United States, 719 F.2d 1567, 1573 (Fed. Cir. 1983); Keco Indus., Inc. v. United States, 492 F.2d 1200, 1205-06 (Ct. Cl. 1974). See generally J. Cibinic & R. Nash, supra note 181, at 1035-36.

¹⁸⁶424 F.2d 859 (D.C. Cir. 1970).

¹⁸⁷Id. at 869.

¹⁸⁸J. Cibinic & R. Nash, supra note 177, at 1007.

¹⁸⁹Pub. L. No. 97-164, Title I § 133(a), 96 Stat. 25, Oct. 29, 1992 (codified at 28 U.S.C. § 1491(a)(3)).

¹⁹⁰The Competition in Contracting Act is Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

¹⁹¹See infra notes 199-204 and accompanying text.

(iii) Forums. In most federal litigation, plaintiffs can obtain injunctive relief from only one forum--the district courts. By contrast, in contract award controversies four different forums can provide some form of preliminary relief: (A) the Court of Federal Claims; (B) the district courts; (C) the GAO; and (D) the GSBCA.

(A) The Court of Federal Claims. As noted above, the Federal Courts Improvement Act of 1982 gave the Claims Court limited authority to enter equitable relief in bid protest cases. 28 U.S.C. § 1493(a)(3) codifies the Court of Federal Claims equitable jurisdiction. This statute provides as follows:

To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

The scope of the Court of Federal Claims jurisdiction to award injunctive relief in bid protest cases is limited both temporally and by the relationship between the plaintiff and the government. The court has jurisdiction to award such relief only in those cases in which the plaintiff files suit before the contract is awarded and where an implied-in-fact contract exists between the plaintiff and the United States.

First, by the terms of the statute, the authority of the Court of Federal Claims to render injunctive relief is restricted to those cases in which the plaintiff files suit before contract award. The

court is without jurisdiction to give equitable relief if the plaintiff files suit after contract award.¹⁹² If, however, the plaintiff sues before contract award, a subsequent award of the contract does not divest the Claims Court of its jurisdiction.¹⁹³

The second prerequisite for the Court of Federal Claims exercise of equitable jurisdiction is the existence of a contractual relationship between the plaintiff and the federal government. The statute provides that the authority of the Court of Federal Claims to render injunctive relief extends to contract claims, and the contractual relationship between the plaintiff and the government in a bid protest setting usually arises from the implied promise the United States makes to fairly and honestly consider all bids in accordance with applicable law.¹⁹⁴ Thus, the Court of Federal Claims generally will not enter injunctive relief in lawsuits brought by disappointed bidders for subcontracts on government contracts,¹⁹⁵ nonbidders,¹⁹⁶ nonresponsive bidders,¹⁹⁷ and potential bidders challenging the terms of bid invitations.¹⁹⁸

¹⁹²United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983). Actions to enjoin the exercise of contract options are post-award lawsuits and the Claims Court lacks jurisdiction to grant equitable relief in them. C.M.P., Inc. v. United States, 8 Cl. Ct. 743 (1985).

¹⁹³F. Alderete Gen. Contractors, Inc. v. United States, 715 F.2d 1477 (Fed. Cir. 1983).

¹⁹⁴Ingersoll-Rand Co. v. United States, 2 Cl. Ct. 373, 375 (1983); J. Cibinic & R. Nash, supra note 181, at 1020-22; Comment, Does a Bid Protester Have Standing?, supra note 181, at 805. In Busby School v. United States, 8 Cl. Ct. 588 (1985), the court held that its jurisdiction was limited to contracts involving the procurement process. It refused to grant equitable relief to an Indian reservation school board that had sought to force the government to fund a contract for renovations to a reservation school.

¹⁹⁵Ingersoll-Rand, 2 Cl. Ct. at 375. The court might consider such protests, however, where government control of the award of the subcontracts is so great that the prime contractor is simply a conduit between the government and the subcontractors. See generally Ocean Enterprises, Inc., 65 Comp. Gen. 585, 86-1 CPD para. 479 (1986).

¹⁹⁶Hero, Inc. v. United States, 3 Cl. Ct. 413 (1983).

Moreover, the Court of Federal Claims usually will not review the suspension or debarment of a government contractor, unless the sanctions are somehow related to the bid process.¹⁹⁹

(B) The District Courts. The federal question statute, 28 U.S.C. § 1331, provides the jurisdictional basis for the district courts award of equitable relief in contract award controversies; the APA, 5 U.S.C. § 702, furnishes the waiver of sovereign immunity and the remedy.²⁰⁰ While the courts unanimously recognize the jurisdiction of the district courts to award such relief in post-award cases,²⁰¹ the courts disagree about whether the district courts have the power to award equitable relief before the contract is awarded.²⁰² The source of the controversy is the use of the term "exclusive jurisdiction" in § 1493(a)(3) in describing the authority of the Court of Federal Claims to award equitable relief.

(..continued)

¹⁹⁷*Yachts America, Inc. v. United States*, 3 Cl. Ct. 447 (1983). The court will review the solicitation and the bid to determine whether the bid was responsive. *Olympia USA, Inc. v. United States*, 6 Cl. Ct. 550 (1984).

¹⁹⁸*Ingersoll-Rand*, 2 Cl. Ct. at 375.

¹⁹⁹*Sterlingwear of Boston, Inc. v. United States*, 11 Cl. Ct. 517 (1987); J. Cibinic & R. Nash, supra note 191, at 1022.

²⁰⁰*Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1969).

²⁰¹See, e.g., *United States v. John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983).

²⁰²Compare *In re Smith & Wesson*, 757 F.2d 431 (1st Cir. 1985); *Coco Bros., Inc. v. Pierce*, 741 F.2d 675 (3d Cir. 1984); *John C. Grimberg Co. v. United States*, 702 F.2d 1362 (Fed. Cir. 1983) (dicta), with *B.K. Instruments, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983) (dicta), *Opal Mfg. Co. v. U.M.C. Indus., Inc.*, 553 F. Supp. 131 (D.D.C. 1982). See generally Comment, Equitable Relief Over Government Contract Claims, supra note 181.

(C) GSBCA. As a general rule, the boards of contract appeals have no jurisdiction to act in bid protest cases. The government's implied-in-fact contract to treat all bids honestly and fairly is not a contract falling under the Contract Disputes Act of 1978.²⁰³

(D) GAO. The GAO traditionally has resolved bid protests. Until relatively recently, it was the only forum that could do so.²⁰⁴ Before 1984, however, GAO was without the authority to stay the award of a contract pending its resolution of the award controversy.²⁰⁵ The Competition in Contracting Act of 1984 provided for an automatic 90-day stay of contract awards during which time the GAO can consider the protest.²⁰⁶

(iv) Scope of Inquiry. Both the Court of Federal Claims and the district court use the standard four-part test for preliminary injunctive relief in adjudicating contract award controversies.²⁰⁷ Both the scope of the courts' inquiry and the relevant factors considered vary, however, from other types of cases.

(A) Likelihood of Success on the Merits. As in other cases, an applicant for preliminary relief in a bid protest must show a likelihood of success on the merits. The scope of the court's review, however, is circumscribed. The sole inquiry is whether the agency's

²⁰³Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983).

²⁰⁴J. Cibinic & R. Nash, supra note 181, at 1006.

²⁰⁵Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979, 985 (3d Cir. 1986).

²⁰⁶31 U.S.C. §§ 3553-54. The constitutionality of these provisions was upheld in Ameron, 809 F.2d at 985, and Universal Shipping Co. v. United States, 652 F. Supp. 668 (D.D.C. 1987).

²⁰⁷See generally James A. Merritt & Sons v. Marsh, 791 F.2d 328 (4th Cir. 1986); Design Pak, Inc. v. Sec'y of Treasury, 801 F.2d 525 (1st Cir. 1985); Dynalectron Corp. v. United States, 659 F. Supp. 64 (D.D.C. 1987); Olympia USA, Inc. v. United States, 6 Cl. Ct. 550 (1984).

determination lacked a rational or reasonable basis or violated applicable statutes or regulations to the bidder's prejudice.²⁰⁸ In the district courts, the plaintiff has the burden of showing a likelihood of success by a preponderance of the evidence.²⁰⁹ The judges of the Court of Federal Claims are split over the appropriate quantum of proof, some holding that clear and convincing evidence is required, while others adhere to the preponderance standard.²¹⁰

(B) Irreparable Harm. In most bid protest cases, courts will find that either the loss of the contract or the loss of the opportunity to compete for the contract constitutes sufficient irreparable harm for preliminary relief.²¹¹ Courts will not permit unsuccessful bidders to recover their anticipated profits,²¹² nor will the courts order a contract awarded to a particular plaintiff.²¹³ Once lost, a government contract or the opportunity to compete for it is lost

²⁰⁸*M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Action Mfg. Co. v. United States*, 10 Cl. Ct. 474 (1986); *Baird Corp. v. United States*, 1 Cl. Ct. 662 (1983).

²⁰⁹*J. Cibinic & R. Nash*, *supra* note 181, at 1009. *See, e.g., Advanced Seal Technology, Inc. v. Perry*, 873 F. Supp. 1144 (N.D. Ill. 1994) (preliminary injunction denied where plaintiff had little likelihood of success on the merits).

²¹⁰*Compare Isometrics, Inc. v. United States*, 11 Cl. Ct. 346 (1986); *Baird Corp. v. United States*, 1 Cl. Ct. 662 (1983), *with Quality Transport Serv., Inc. v. United States*, No. 165-87C (Cl. Ct. April 28, 1987); *DLM & A, Inc. v. United States*, 6 Cl. Ct. 329 (1984).

²¹¹*See M. Steinthal*, 455 F.2d at 1289.

²¹²*Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970); *DLM & A, Inc. v. United States*, 6 Cl. Ct. 329 (1984).

²¹³*Delta Data Sys. Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984); *Golden Eagle Refining Co. v. United States*, 4 Cl. Ct. 613 (1984); *see Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1058 (9th Cir. 1987) (the court order can, however, undo an illegal action and require the agency to proceed with the procurement which is in progress, technically leaving the grant of the government contract to the discretion of the agency while in effect directing the award of the contract itself).

forever. Thus, an unsuccessful bidder cannot be made whole by a favorable judgment at the end of the case.²¹⁴

(C) Relative Harm and the Public Interest. In bid protest litigation, the relative harm to the government from the imposition of injunctive relief and the public interest play an especially important role. The impact of an injunction in a contract award case is usually easy to see: it includes all of the ramifications inherent in the government's inability to award the contract. The effects of equitable relief may include such consequences as harm to the national defense (if the contract is particularly sensitive),²¹⁵ the expiration of the bids,²¹⁶ the impairment of a government program dependent on the contract, injury to third-parties (particularly the successful bidder), and the loss of money already expended on the contract if the suit comes post-award.

f. Declaratory Judgment.

(1) Statute and Rule. The Federal Declaratory Judgment Act of 1934,²¹⁷ is codified at 28 U.S.C. §§ 2201-02. The Act states as follows:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such

²¹⁴The courts are split over whether the recovery of bid preparation costs can remedy the loss of the contract. Compare Ainslie Corp. v. Middendorf, 381 F. Supp. 305 (D. Mass. 1974), with Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975).

²¹⁵28 U.S.C. § 1491(a)(3).

²¹⁶See Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517 (1987).

²¹⁷48 Stat. 955.

declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Federal Rule of Civil Procedure 57 provides that actions under the Declaratory Judgment Act are subject to the Federal Rules.

The procedure for obtaining a declaratory judgment pursuant to Title 28, USC, § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

The Act is purely procedural in character; it neither waives the government's sovereign immunity nor creates an independent basis for jurisdiction in the federal courts.²¹⁸

(2) Historical Origins. While declaratory judgment actions have served as procedural devices in civil law systems for centuries, they did not become a part of the English law until the mid-19th Century and were unknown in America until well into the 20th century.²¹⁹ Following

²¹⁸See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); *Marathon Oil Co. v. United States*, 807 F.2d 759, 763 (9th Cir. 1986); *Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985); *Mitchell v. Riddell*, 402 F.2d 842, 846 (9th Cir. 1968), cert. denied, 394 U.S. 456 (1969).

²¹⁹Developments in the Law--Declaratory Judgments, 62 Harv. L. Rev. 787, 790 (1949). See 1 Anderson, *Actions for Declaratory Judgments* 3 (2d ed. 1951).

World War I, a number of states began enacting statutes providing a broad-based declaratory judgment remedy,²²⁰ and by World War II, most states had adopted such laws.²²¹

Fears that declaratory judgments contravened the Article III proscription against advisory opinions inhibited their development in the federal courts.²²² Moreover, several Supreme Court decisions early in the century evinced hostility towards declaratory judgments and reinforced the reluctance to adopt the device at the federal level.²²³ In Nashville, Cincinnati and St. Louis Railway v. Wallace,²²⁴ however, the Court, reviewing a state declaratory judgment for the first time, held that it met the elements of a "case or controversy" under Article III.

After Wallace, doubts about the constitutionality of the declaratory judgment faded, and Congress passed the Federal Declaratory Judgment Act the following year.²²⁵ Three years later, the Supreme Court unanimously upheld the Act's constitutionality in Aetna Life Insurance Co. v. Haworth.²²⁶

²²⁰Although declaratory judgments, as broad procedural tools, are of relatively recent origin, declaratory relief has been available with respect to certain disputed rights for some time (e.g., quiet title actions, interpleader). Developments in the Law--Declaratory Judgments, supra note 221, at 787.

²²¹Id. at 791; E. Borchard, Declaratory Judgments 132-33 (2d ed. 1941).

²²²G. Gunther, Constitutional Law 1538 (11th ed. 1985).

²²³See Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927); Muskat v. United States, 219 U.S. 346 (1911).

²²⁴288 U.S. 249 (1933).

²²⁵G. Gunther, supra note 224, at 1539 n.11; P. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 129 (2d ed. 1973) [hereinafter Hart & Wechsler's Federal Courts].

²²⁶300 U.S. 227 (1937).

(3) The Nature of the Remedy. A declaratory judgment is an instrument by which a court can adjudicate the rights of parties to a controversy without directing any coercive relief.²²⁷ "[I]n form [the declaratory judgment] differs in no essential respect from any other action, except that the prayer for relief does not seek execution or performance from the defendant or opposing party. It seeks only a final determination, adjudication, or judgment from the court."²²⁸ The declaratory action provides a means by which a party can receive adjudication of a controversy to forestall, rather than merely repair, damage.²²⁹ The party need not wait until the harm is imminent or has occurred before seeking judicial relief.

²²⁷Developments in the Law--Declaratory Judgments, *supra* note 221, at 787: "The declaratory judgment comprises an authoritative judicial statement of the jural relationships between parties to a controversy. It does not itself, however, have any direct coercive effect. *Ernst and Young v. Depositors Economic Protection Corporation*, 45 F.3d 530 (1st Cir. 1995) (the Act does not expand federal court jurisdiction). *But cf. Doe v. United States Air Force*, 812 F.2d 738, 740 (D.C. Cir. 1987) (court assumed defendant would respond to declaratory judgment as if it were coercive in character).

²²⁸E. Borchard, *supra* note 223, at 25-26. See Developments in the Law--Declaratory Judgments, *supra* note 221, at 788-89:

There is only a difference of degree between ordinary legal or equitable remedies and the modern declaratory action both as to the presence of declaratory relief and as to the absence of coercion. A coercive equitable decree necessarily includes a limited statement of rights to be enforced or respected. Similarly, a judgment at law involves a declaration of liability, resulting from a given course of conduct, to pay a sum as damages. Furthermore, since the "noncoercive" declaratory judgment is *res judicata*, it may serve as the basis for a subsequent equitable decree or judgment at law. This possibility of further relief gives, in practice, an immediate coercive effect to the declaratory judgment.

(footnotes omitted).

²²⁹*Id.* at 789. See Anderson, *supra* note 221, at 20; M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 75 (1980); Note, Declaratory Judgment and Matured Causes of Action, 53 Colum. L. Rev. 1130 (1953).

(4) Prerequisites for Relief. The Declaratory Judgment Act "creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it."²³⁰ To be entitled to declaratory relief, a plaintiff must demonstrate that an "actual controversy" exists between the parties.²³¹ The test is whether "there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment."²³² "A mere abstract question or hypothetical threat is not a sufficient basis for a declaratory judgment under the Act[,]"²³³ however, a plaintiff need not prove irreparable injury or an entitlement to any other form of relief, such as damages.²³⁴ Finally, declaratory relief is a discretionary remedy.²³⁵ A court need not award a declaratory judgment and generally will

²³⁰C. Wright et al., supra note 16, at 671. See *United States v. Doherty*, 786 F.2d 491, 498-99 (2d Cir. 1986).

²³¹E.g., *American Fed'n of Gov't Employees v. O'Connor*, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, 474 U.S. 909 (1985); *Windsurfing Intern. Inc. v. AMF Inc.*, 828 F.2d 755, 758 (Fed. Cir. 1987); *Swanson v. United States*, 600 F. Supp. 802, 805-06 (D. Idaho 1985), aff'd, 789 F.2d 1368 (9th Cir. 1986); *Bellefonte Reins. Co. v. Aetna Cas. and Sur. Co.*, 590 F. Supp. 187, 190-91 (S.D.N.Y. 1984).

²³²*Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). See *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972); *Caldwell v. Gurley Refining Co.*, 755 F.2d 645, 649-50 (8th Cir. 1985).

²³³*Long Island Lighting Co. v. County of Suffolk*, 604 F. Supp. 759, 762 (E.D.N.Y. 1985), citing *Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Stover v. Meese*, 625 F. Supp. 1414 (S.D.W. Va. 1986).

²³⁴*Steffel v. Thompson*, 415 U.S. 452, 466-72 (1974); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *Rushia v. Town of Ashburnham*, 582 F. Supp. 900, 902 (D. Mass. 1983). Cf. *Olagues v. Russonelli*, 770 F.2d 791, 803 (9th Cir. 1985) ("Declaratory relief may be appropriate even when injunctive relief is not").

²³⁵See *Tempco Electric Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746 (7th Cir. 1987) (where a party files for declaratory judgment and the adverse party subsequently files a coercive action, the court retains the discretion to decline to hear the former action).

only do so where the judgment will serve a "useful purpose."²³⁶ The declaratory judgment remedy is illustrated by the following case:

CCCO-WESTERN REGION v. FELLOWS
359 F. Supp. 644 (N.D. Cal. 1972)

MEMORANDUM AND ORDER

PECKHAM, District Judge.

On July 25, 1972, five individuals, Kerry Berland, Carolyn Berland, Judith Clark, Raymond Johnson, and Vincent O'Connor, entered the Presidio on Lincoln Boulevard and began distributing leaflets which outlined ways that soldiers can leave active duty. All plaintiffs except Carolyn Berland are employees of CCCO-Western Region, an organization known for its research into and publications concerning the draft and military organization. The pamphlet plaintiffs handed out was a publication of CCCO-Western Region.

Three of the individuals were informed by military police that they were violating the Presidio commander's regulation 210-10 which requires that prior permission of the commander be obtained before any leafletting is done. At this point, Carolyn and Kerry Berland left the premises. The others remained and were arrested under 18 U.S.C. § 1382, which charge was subsequently dismissed (' 1382 makes it a crime to enter a military base in violation of the commander's order that one stay off). Soon after this incident, the three plaintiffs who had stayed were given "bar letters" which are issued by Colonel Fellows, the Presidio commander, and state that their further entry on the Presidio could subject plaintiffs to prosecution under § 1382. The Berlands have not received such bar letters.

All plaintiffs now seek a declaratory judgment that the bar letters are unconstitutionally issued and void; that the parts of rule 210-10 which require prior approval of leafletting are unconstitutional; that Army Regulation 210-10, which gives base commanders power to exercise prior restraint, is unconstitutional as applied to bases that have been opened to the public; and that § 1382 is similarly unconstitutional as applied to people on open bases, or that § 1382 does not apply to such people.

²³⁶Hart and Wechsler's Federal Courts, supra note 227, at 133. The factors considered include whether the declaration will end the controversy, the convenience of the parties, the public interest, and the availability and relative convenience of other remedies. Id.

Also, plaintiffs request preliminary and permanent injunctions restraining defendant from barring them from the Presidio for peaceful exercise of First Amendment rights. Defendants move for dismissal, or in the alternative summary judgment.

STANDING

Defendants contest the standing of plaintiffs CCCO-Western Region, and Kerry and Carolyn Berland to maintain suit at this time. They argue that CCCO has no direct interest in this litigation, and that the Berlands present no justiciable controversy because they have not been presented with a bar order. Defendants rely upon Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), and Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1962). This court believes that CCCO and the Berlands may maintain this action under these holdings.

The test for CCCO, as stated by the United States Supreme Court in Sierra Club v. Morton, supra, is

"whether the party had alleged such a 'personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947.

. . . Id., 405 U.S. at 732, 92 S. Ct. at 1364, 31 L. Ed. 2d at 641. CCCO has a stake in the outcome of this controversy in that its members are being threatened with prosecution for distributing leaflets of its own publication, and in furtherance of objectives it fosters. The effectiveness of CCCO's work is obviously at stake in an action seeking to vindicate the rights of its members to distribute its literature. CCCO has standing to sue.

Defendants quote from the decision in Laird v. Tatum, supra, to support their position regarding the Berlands:

"Allegations of subjective 'chill' are not an adequate substitute for claim of specific present objective harm or a threat of specific future harm; . . . " Id., 408 U.S. at 13, 92 S. Ct. at 2326, 33 L. Ed. 2d at 163-164 (emphasis added).

They seem to overlook the italicized language, however, which recognizes that allegations of chilling effect based upon threats of specific future harm do present a

justiciable question to the court. Here, the Berlands allege the incident leading to the issuance of bar letters to their friends. They allege that if they proceed to distribute leaflets on the Presidio, in accordance with what they perceive to be their constitutional rights, they too will receive bar letters and thereafter be subject to criminal prosecution on reentry. They are, in other words, one visit away from the immediate threat of criminal prosecution to which the other individual plaintiffs in this suit have been subjected. The Berlands are equally deterred with the other plaintiffs from entering the Presidio and distributing leaflets. It is no solace to them, in light of their objections, to say that the Berlands "are not chilled in the exercise of any First Amendment rights outside the Presidio." (Defendant's Memorandum in Support of Motion to Dismiss, p. 27). This court finds that the Berlands present a justiciable controversy and are properly parties to this action, under the holding in Laird v. Tatum, supra.

....

4.4 Conclusion.

The remedies that may be sought by plaintiffs suing the Army are limited only by the imagination of their attorneys. It is incumbent on the military lawyer to analyze claims and sort out reality from imagination.

